SUMMIT COUNTY DISTRICT COURT
Karen Ann Romeo
District Court Judge
Fifth Judicial District
P.O. Box 269
Breckenridge, Colorado 80424

District Court Chambers
Honorable Karen Ann Romeo

Phone: (970) 547-2634
karen.romeo@judicial.state.co.us

RE: Letter of recommendation for Nicholas Gunther

September 26, 2019

To Whom It May Concern;

My name is Karen Romeo and I am a District Court Judge in the 5th Judicial District, which is in Breckenridge, Colorado. The purpose of this letter is to highly recommend Mr. Nicholas Gunther for any clerking opportunity.

Nicholas worked as an intern in our Combined Courts from approximately June of 2019 through August of 2019. As an intern I found Nicholas to have many strengths. He is extremely reliable and hard working. When he finished one project, he eagerly asked if there was something else he could work on. Nicholas is very bright, and with just a small amount of guidance he was able to produce some very well written and thoughtful draft orders. His research and writing skills are excellent.

One of the things I admired most about Nicholas was his desire and eagerness to meet with me and receive feedback. He asked very good questions and seemed eager to learn new things. I found him to be very mature for his age, and a very attentive and deep thinker.

Many, including myself, found Nicholas to be very likable and easy to work with. Nicholas is highly regarded here in the 5th. In sum, I think you will find that Nicholas is an excellent candidate for any clerkship.

Thank you for your time and consideration. Please feel free to contact me should you have any questions or concerns.

Sincerely,

Karen Romeo
District Court Judge 5th JD

Nicholas Gunther - Writing Sample

This writing sample is an order on a motion to dismiss which I prepared as a law clerk for the Honorable Jason Carrithers of the Colorado 1st Judicial District. This order reflects only limited grammatical edits from Judge Carrithers. Judge Carrithers has given me permission to use this document as a sample of my writing, and it is entirely my own work product.

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401-6002	
Plaintiff: BURGUNDY PARTNERS, LLC v. **Defendant:** WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY BANK OF AMERICA MERRILL LYNCH TRUST 2015-C20, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2015-C20; AND DOES 1-10	▲COURT USE ONLY▲ **Case Number:** 2022CV30736 **Division:** 2 **Courtroom:** 420
ORDER RE: DEFENDANT WELLS FARGO BANK'S MOTION TO DISMISS	

This MATTER comes before the Court on Defendant Wells Fargo Bank's ("Lender") Motion to Dismiss, filed, through counsel, on September 12, 2022. Burgundy Partners, LLC ("Plaintiff") filed a Response on October 4, 2022, and Defendant Wells Fargo Bank filed a Reply on October 11, 2022. Having reviewed the Motion and all other relevant materials, THE COURT FINDS AND ORDERS AS FOLLOWS:

I. BACKGROUND

Viewing the allegations in the light most favorable to Plaintiff, Plaintiff is the borrower under a Loan Agreement, dated December 30, 2014, pursuant to which the Loan was made by Bank of America, N.A., as the lender ("Original Lender"). Compl. ¶ 21. The Loan was secured by a first priority deed of trust on Plaintiff's four-unit commercial property in Jefferson County, Colorado, known as 14255 Colfax Drive, Lakewood, Colorado 80401 (the "Property"). Compl. ¶ 2. A *Deed of Trust, Assignment of Leases and Rents and Security Agreement* between Plaintiff and Original Lender, dated December 30, 2014 was recorded on December 31, 2014, as Instrument Number 2014111675, in the Recorder's Office of Jefferson County, Colorado, securing the Loan in the original principal amount of $3,925,000 (the "Deed of Trust"). Compl. ¶ 22. Original Lender assigned all of its interests in the Loan and Deed of Trust to Lender by an assignment dated January 29, 2015. Compl. ¶ 23.

Prior to May 1, 2020, Plaintiff had performed all of its obligations under, and was in full compliance with, the Loan Agreement. Compl. ¶ 27. During the weeks before May 1, 2020, certain

orders, issued by various government authorities with jurisdiction over the Property, and prompted by the COVID-19 pandemic, prohibited full commercial activity at the Property for a period of months which deprived the Property's tenants of the ability to use their respective leased premises for uses permitted by the respective leases. Compl. ¶ 28. After these government-mandated closures were put into effect, Plaintiff's tenants at the Property defaulted on their obligations to pay rent to Plaintiff. *Id*. These defaults by its tenants led Plaintiff to default on its monthly mortgage payments to Lender. *Id*.

Following the re-opening of the tenants' businesses at the Property, Plaintiff attempted to negotiate an agreement with Lender to reinstate the Loan by making all past-due mortgage payments from the Property's operations and from capital contributions by Plaintiff's members. Compl. ¶ 29. After more than six months of being non-responsive to Plaintiff's requests for cooperation, Lender responded with a proposed agreement that Plaintiff rejected as not commercially reasonable and "value destructive." Compl. ¶ 33.

Lender accelerated the Loan by a letter dated July 14, 2021. Compl. ¶ 40. By that letter, Lender demanded that Plaintiff "immediately pay all such amounts due under the Loan Documents, together with any expenses and charges resulting therefrom." *Id*. That letter did not state any specific amount Lender was demanding nor did it include any itemization of, or support for, any "expenses and charges." *Id*. Lender recorded its Notice of Sale on or about December 15, 2021, scheduling a foreclosure sale for April 7, 2022. Compl. ¶ 45.

Plaintiff sold the Property to a third party and repaid the Loan in order to avoid Lender's imminent foreclosure sale. Compl. ¶ 7. To enable the closing of the third party sale before Lender's foreclosure, Plaintiff asked that Lender provide a final payoff demand inclusive of all amounts that Lender claimed were owing on the subject loan on February 4, 2022 (the "February 4 Payoff Request"). *See* Compl. ¶ 46; Pl. Ex. 18. The February 4 Payoff Request was made by letter to Lender's counsel and delivered to Lender's counsel by email. *See id*. In the February 4 Payoff Request, Plaintiff requested Lender's "accounting and reasonable documentation" for the amount Lender would claim as owing. Plaintiff's February 4 Payoff Request also stated:

> Reservation of Rights: In the event the Final Payoff Demand exceeds [$4,312,716.09] then all amounts paid to Lender at Closing in excess of the amount actually due to Lender under applicable law shall be deemed to have been paid under protest. In any event, and in all events, the Company's rights, claims and interests, without limitation, are hereby reserved.

See Compl. ¶ 48; Pl. Ex. 18. Lender subsequently provided an itemized payoff statement dated February 28, 2022 demanding the payment of $4,849,025.77 by March 1, 2022. *See* Pl. Ex. 2. Plaintiff closed on the sale of the Property to a third party on March 1, 2022, and in connection therewith paid the Lender in full and obtained a release of Lender's deed of trust. *See* Compl. ¶¶ 2, 7.

II. LEGAL STANDARD

Colorado Rule of Civil Procedure ("C.R.C.P.") 12(b)(5) permits a presiding court to dismiss claims for "failure to state a claim upon which relief can be granted." To survive a Rule 12(b)(5) motion, the plaintiff must plead facts sufficient to state a facially plausible claim for relief. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (embracing the plausibility standard that the U.S. Supreme Court adopted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677.

In reviewing a motion to dismiss under C.R.C.P. 12(b)(5), the trial court must accept all allegations of material fact as true and view the allegations in the light most favorable to the non-moving party. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). Rule 12(b)(5) motions to dismiss are viewed with disfavor and should not be granted unless it appears beyond doubt that the plaintiff cannot prove a set of facts that would entitle him or her to relief. *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538, 539 (Colo. App. 2005).

In evaluating a C.R.C.P. 12(b)(5) motion to dismiss, the trial court considers only those facts stated in the complaint, accepting them as true and viewing them in the light most favorable to the plaintiff. *Yandon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). To the extent, however, that the plaintiff's complaint references a document, and the document is central to the plaintiff's alleged claims, the court may consider the referenced document without converting a motion to dismiss into a motion for summary judgment. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007). In such situations, it is sufficient that the referenced document is referenced in and central to the complaint; the plaintiff need not to have formally incorporated the document in question. *Titan Indemnity Co. v. Travelers Prop. Casualty Co. of Am.*, 181 P.3d 303, 306 (Colo. App. 2007).

III. ANALYSIS

A. Plaintiff paid Lender under protest.

Lender argues that the voluntary payment rule presents an absolute bar to Plaintiff's claims. Def. Mot. Dismiss 10. Under this rule, "where one makes a voluntary payment with knowledge of all relevant facts, and then sues to recover that payment, there generally can be no recovery, even if there was no legal liability to pay in the first place." *Skyland Metropolitan Dist. v. Mountain West Enterprise, LLC*, 184 P.3d 106, 127 (Colo. App. 2007). To defeat application of the voluntary payment rule, the payor must show that the payment was made "under protest or duress or a mistake as to all relevant facts." *Id.*

On January 27, 2022, Lender sent Plaintiff a "Payoff Demand Statement" dated January 25, 2022 demanding the payment of $4,930,768.79 by February 1, 2022. Pl.'s Ex. 5, 18. On February 4, 2022, Plaintiff's counsel sent Lender a letter disputing the penalty interest assessment and penalty fees for lack of supporting documentation and calculations and as illegal under Colorado law. Pl.'s Ex. 18. Plaintiff's letter stated immediately before its conclusion:

> "Reservation of Rights: In the event the Final Payoff Demand exceeds the Requested Reduced Payoff Amount (as defined below) then all amounts paid to Lender at Closing in excess of the amount actually due to Lender under applicable law shall be deemed to have been paid under protest. In any event, and in all events, the Company's rights, claims and interests, without limitation, are hereby reserved."

Id. (emphasis in original).

Plaintiff's "Requested Reduced Payoff Amount" was $4,312,716.09, reflecting a 50% across-the-board reduction of the default interest, late fees, "property protective advances," "processing fee," "IOA," "SS," "defeasance," and "liquidation" fees. *See id*. Thereafter, Lender provided an itemized "Payoff Demand Statement" dated February 28, 2022 demanding the payment of $4,849,025.77 by March 1, 2022. Pl. Ex. 2. Plaintiff closed on the sale of the Property to a third party on March 1, 2022, and in connection therewith paid the Lender in full and obtained a release of Lender's deed of trust. *See* Compl. ¶¶ 2, 7.

The Court finds that Plaintiff's February 4, 2022 letter renders Plaintiff's subsequent payment to Lender made under protest. Plaintiff's February 4, 2022 letter placed Lender on notice that any payment to Lender at the closing would be made under protest. This protest was conditioned on the Final Payoff Demand exceeding $4,312,716.09. As the February 28, 2022 Final Payoff Demand amounted to $4,849,025.7, Plaintiff's condition was met the day before the March 1, 2022 closing.

Lender cites three cases to support its proposition that Plaintiff's payment was not made under protest, only two of which address payment under protest.[1] The present case is distinguishable from *Skyland*, 184 P.3d 106 and *Davis v. City & County of Denver*, 207 P.2d 1185 (Colo. 1949). In *Skyland* the developer never submitted any written protest of the government fees at issue either immediately before or at the time of payment. *See Skyland*, 184 P.3d at 128 ("Although the developers may have asked for explanations of the bills and argued with the districts' management about them, nothing in the record shows that they took the further step of paying the bills under a protest in writing").

In *Davis*, after a coal license fee was ruled unconstitutional, a coal company sought to obtain a refund from the City and County of Denver for money paid for coal dealers' licenses for two separate years. *Davis*, 207 P.2d 1185. The coal company paid the 1946 license fee with two checks one of which was endorsed "For 1946 license-coal. Paid under protest." *Id*. at 1186. The check for the 1947 license fee, paid approximately three and a half months later, carried no such endorsement. *See id*. Our Supreme Court found, "[t]here is no evidence in the record, direct or

[1] Lender cites *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380 (Colo. 1994) which does not address any issue relevant to the Motion. This error may stem from the court in *Skyland* citing *M.D.C./Wood* after the sentence "We conclude the record supports the trial court's finding that there is no evidence that the developers protested the fees at the time of payment." *See Skyland*, 184 P.3d at 128. *Skyland* in fact cited *M.D.C./Wood* in support of the proposition that "In an appeal of a judgment entered after trial to the court, we defer to the trial court's credibility determinations and will disturb its findings of fact only if they are clearly erroneous and are not supported by the record." *See id.* at 115.

circumstantial, to justify us in finding that payment of the 1947 license fee was made under duress, nor, as we have said, was the payment made under protest." *Id.* at 1187.

Unlike *Davis*, there exists direct evidence that Plaintiff's payment was made under protest. Plaintiff's February 4, 2022 letter includes under "Reservation of Rights" language putting Lender on notice that Plaintiff's closing payment would be made under protest absent a write-down to $4,312,716.09. *See* Pl.'s Ex. 18. *Davis* stands for the proposition that duress or payment under protest as to one debt does not result in payment of a similar but distinct debt being under protest. *Davis*, 207 P.2d at 1187. Unlike the payors in *Davis*, Plaintiff does not seek to extend the written protest of one payment to a different payment.

Plaintiff alerted Lender on February 4, 2022 that it would make its closing payment under protest. That Plaintiff made the closing payment on or around March 1, 2022 does not render Plaintiff's earlier protest ineffective. The Court finds that the authority cited by Lender does not support the proposition that payment under protest must be accomplished by written notice on the same day as payment.[2] Rather the Court must look to the function of the written notice requirement which is to put the payee on notice that it may be liable for a refund. *See Skyland* 184 P.3d at 128. Lender is a sophisticated institution that can hardly claim surprise or prejudice from the filing of this present action. Plaintiff gave its conditional notice of payment under protest after the closing process began but before the closing was completed. Plaintiff's notice gave the parties a final opportunity to resolve this dispute without litigation.

B. Plaintiff presents a controversy for which the Court may enter declaratory judgment.

The purpose of the declaratory judgment law is to afford parties judicial relief from uncertainty and insecurity with respect to their legal relations. *Wainscott v. Centura Health Corp.*, 351 P.3d 513, 518 (Colo. App. 2014). Because it is a remedial statute, it must be "liberally construed and administered" to accomplish its purpose. *Id*. (quoting C.R.S. § 13–51–102). Thus, "the required showing of demonstrable injury is somewhat relaxed in declaratory judgment actions." *Id.* (quoting *Mt. Emmons Min. Co. v. Town of Crested Butte,* 690 P.2d 231, 240 (Colo.1984)).

A declaratory judgment action is only appropriate when the rights asserted by the plaintiff are present and cognizable ones. *Farmers Ins. Exch. v. Dist. Ct. for Fourth Jud. Dist.*, 862 P.2d 944, 947 (Colo. 1993). "It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Id*. (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)). A declaratory judgment action properly resolves an existing question or legal controversy. *Id.* "Declaratory judgment proceedings may not be invoked to resolve a

[2] Lender cites *Skyland* for the proposition that "[i]n assessing the application of the voluntary payment rule in the face of an alleged protest, the Court should look to whether the protest was (i) done in writing and (ii) at the time of the payment." 184 P.3d at 128. *Skyland* notes the trial court's finding that no protest of the disputed fees was lodged at the time of payment, but nowhere states the proposition that written protest cannot be made before the time of payment. *See id*. *Skyland* instead looked for record evidence that "shows that [the payor] took the further step of paying the bills under a protest in writing." *See id*.

question which is non-existent, even though it can be assumed that at some future time such question may arise." *Id.* (quoting *Taylor v. Tinsley*, 330 P.2d 954, 955 (Colo. 1958)).

If entered, a declaratory judgment would effect a change in the plaintiff's present rights or status. *Id*. Upon issuance of a declaratory judgment, "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." C.R.S. § 13-51-112; C.R.C.P. 57(h) (identical to statute).

Lender argues that declaratory judgment is inappropriate because Plaintiff has not challenged the construction or validity of the provisions contained in the Loan Agreement or identified an ambiguous contract provision in need of interpretation by the Court. Def. Mot. Dismiss 10. Lender cites C.R.C.P. 57(b) in support of this proposition. C.R.C.P. 57(b) provides "**Who May Obtain Declaration of Rights.** Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." C.R.C.P. 57(b); *see also* C.R.S. § 13-51-106 (identical language). However, C.R.C.P. 57(b) and C.R.S. § 13-51-106 "[do] not restrict the courts' discretionary jurisdiction to cases concerned with a strictly legal interpretation of written instruments." *See Am. Fam. Mut. Ins. Co. v. Bowser*, 779 P.2d 1376, 1379 (Colo. App. 1989).

Questions of construction or validity are not the only questions a court may consider on a declaratory judgment. *See* C.R.S. § 13-51-109. C.R.S. § 13-51-109 and the identical C.R.C.P. 57(e) provide, "**Not a Limitation.** The enumeration in sections (b), (c), and (d) of this Rule does not limit or restrict the exercise of the general powers conferred in section (a) of this Rule, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." C.R.S. § 13-51-109; C.R.C.P. 57(e). In the present matter, a judgment or decree will terminate the controversy or remove an uncertainty. It is clear from the Complaint that Plaintiff suspects that it was charged fees, interest, and expenses that it may not owe under the Loan Agreement or Colorado law.

Lender also contends that Plaintiff fails to allege which charges or by what amount Plaintiff was overcharged. Def. Mot. Dismiss 7. Plaintiff's own uncertainty as to its contractual rights and obligations is not fatal to its claim. *See Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1024 (Colo. App. 1993) ("recovery is allowed once the cause and existence of damages have been established even though the exact amount of damages may be uncertain or impossible to determine"). The thrust of Plaintiff's complaint is that Plaintiff seeks adjudication of what charges beyond the principal, which Plaintiff terms the "Overage," Plaintiff owes under the Loan Agreement.

Plaintiff's legal question is simple: "what did I actually owe on the contract?" Lender may be entitled under the Loan Agreement to recover its expenses related to breach and the cost of enforcement, however, such expenses must be reasonable. *See* Def. Ex. A. at §§ 17.5, 17.6. Likewise, the Loan Agreement provides for a prepayment penalty, but such a penalty might be so large, or a lender's behavior so egregious, as to render the enforcement of a prepayment penalty unconscionable. *See* Def. Ex. A. at § 2.6; *Planned Pethood Plus, Inc. v. KeyCorp, Inc.*, 228 P.3d

262, 266 (Colo. App. 2010). Plaintiff has preserved the reasonability of Lender's charges for adjudication by paying under protest. Plaintiff's question is ripe for review and the Court can afford Plaintiff relief, even in the negative. *See* C.R.S. § 13-51-105; C.R.C.P. 57(a).

C. Discovery is Plaintiff's sole mechanism to obtain Lender's documents and calculations.

Plaintiff's Complaint "requests a declaratory judgment determining the rights and responsibilities of Lender and Plaintiff, including that: Lender shall account to Plaintiff for the Overage by producing the Overage Backup to Plaintiff." Compl. 13. Plaintiff refers to the amount paid above the loan's principle as the "Overage." Plaintiff defines the "Overage Backup" as:

> reasonable backup for the Overage, including an itemized breakdown of all costs and charges, the numeric calculations (amounts, rates and time periods) used to determine interest and other charges based on the passage of time and rates, the calculations (and bases therefor, where not otherwise apparent) used to determine the "defeasance" charge, copies of invoices and proof of payment of costs and expenses (such as canceled checks) where out-of-pocket payments are part of the Overage, a statement of any assumptions used for items for which assumptions were required to be used and not otherwise apparent, and for charges for services and the type(s) of services and hours spent providing such services, and any other available backup for the Overage.

Compl. ¶ 10.

Plaintiff does not identify any contractual provision that grants Plaintiff a right to the calculations Lender used to determine its fees. Nor does Plaintiff identify any principal of contract law that binds Lender to grant Plaintiff an accounting as part of the foreclosure proceedings or upon Plaintiff's demand.

The Court finds that discovery under the Colorado Rules of Civil Procedure is Plaintiff's sole mechanism for compelling Lender to disclose the calculations, assumptions, and rationale behind the various fees associated with Plaintiff obtaining an early release of the Deed of Trust. The Loan Agreement contemplates declaratory judgment and injunctive relief as a remedy. *See* Def. Ex. A § 18.6. As discovery may be a component of the declaratory judgment process, the Court finds it unnecessary to concoct an alternate mechanism for the parties to produce relevant documents and testimony. *See* C.R.S. § 13-51-113.

D. Plaintiff has failed to establish an injunction is necessary.

Plaintiff seeks a temporary injunction "restraining Lender, inclusive of its agents, from changing, altering, destroying, secreting, or in any manner whatever disposing of any financial records, checks, or other orders for the payment or receipt of money, books of account, ledgers, or any other records of any kind whatever relating to the Overage." Compl. 13.

The six elements a court must consider in issuing a preliminary injunction are:

(1) a reasonable probability of success on the merits;
(2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
(3) that there is no plain, speedy, and adequate remedy at law;
(4) that the granting of a preliminary injunction will not disserve the public interest;
(5) that the balance of equities favors the injunction; and
(6) that the injunction will preserve the status quo pending a trial on the merits.

Dallman v. Ritter, 225 P.3d 610, 621 n.9 (Colo. 2010).

Plaintiff has not alleged a real, immediate, and irreparable danger that Lender will destroy relevant documents absent an injunction. On March 2, 2022, Plaintiff's counsel sent Lender's counsel an extensive Demand for Preservation of Evidence addressed to Lender, its counsel, and their respective agents. Pl.'s Ex. 3. Plaintiff has not established why this pre-litigation Demand for Preservation of Evidence is insufficient to restrain Lender and its agents from destroying relevant documents. Nor has Plaintiff established why Colorado's presumptions and penalties for destruction of evidence are insufficient to deter Lender and its agents from destroying relevant documents. *See* C.R.C.P. 37(e).

Plaintiff's request for an injunction is **DENIED** without prejudice.

Lender's Motion to Dismiss is **DENIED**.

Lender is to file its responsive pleadings within 14 days.

So Ordered on October 26, 2022.

BY THE COURT:

Jason D. Carrithers
District Court Judge

Writing Sample

This writing sample is my term paper for my spring 2020 Natural Resources Law course. I updated this paper in February 2021 to submit it for consideration by the Washington University Law Review Online. This paper is entirely my own work product and has been edited by no one else. The paper was inspired by my passion for environmental and energy law and my love for the great outdoors.

Nicholas Gunther

Potential Liability for Groundwater Contamination from Oil and Gas Drilling in Colorado and The Need for Higher Bond Requirements

Abstract

The debate over the relative safety of hydraulic fracturing has roiled Colorado as much as any other state in the Union. The evidence indicates that nontoxic methane leakage from older, improperly constructed or maintained oil and gas wells poses some risk of groundwater contamination. Colorado tort law offers potential recovery for contamination against financially solvent defendants. However, groundwater contamination cases against well operators are few and far between.

When oil and gas well operators go broke or leave Colorado, the state or federal government is left to seal the 'orphan' wells. However, the bonds Colorado well operators must post typically cover only a fraction of the cost of well remediation. Increasing bonding requirements, a change the Colorado Oil and Gas Conservation Commission (COGCC) is considering, would permit agencies like the Bureau of Land Management and the COGCC to more quickly and easily repair the orphaned wells that threaten methane contamination.

Background

There are presently roughly 47,000 active oil and gas wells in the state of Colorado and 52,000 abandoned wells.[1] Colorado accounts for almost 4% of U.S. total crude oil production and also holds about 4% of the nation's economically recoverable crude oil reserves.[2] Colorado also accounted for almost 6% of U.S. 2018 natural gas production and holds 5% of the nation's natural gas reserves.[3] Colorado boasts rich shale formations, not only in the rural south and west of the state but also within the Front Range suburbs, just north of Denver.[4]

Colorado's Water Quality Control Division regulates the discharge of pollutants into the state's surface and groundwater under the provisions of the Colorado Water Quality Control Act of 1974.[5] In turn, the Colorado Oil and Gas Conservation Commission (COGCC) was created as

[1] Kevin Hamm, *Here's a map of every oil and gas well in the state of Colorado*, DENVER POST (May 1, 2017), https://www.denverpost.com/2017/05/01/oil-gas-wells-colorado-map/.

[2] *Colorado, Analysis*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 19, 2020), https://www.eia.gov/beta/states/states/co/analysis.

[3] *Id*.

[4] *Colorado changes its regulatory structure for oil and natural gas production*, U.S. ENERGY INFORMATION ADMINISTRATION (June 27, 2019), https://www.eia.gov/todayinenergy/detail.php?id=39993.

[5] *Groundwater Program*, COLORADO DEPARTMENT OF PUBLIC HEALTH AND EDUCATION (last visited Apr. 11, 2020), https://www.colorado.gov/pacific/cdphe/groundwater-program.

an implementing agency of water quality standards as they relate to oil and gas production.[6] An August 28, 1990 Memorandum of Agreement between the COGCC and Colorado's Water Quality Control Commission and Water Quality Control Division gave the COGCC similar implementing agency authority for oil and gas activities that result in a discharge to groundwater.[7]

One particularly worrisome concern raised by opponents of expanded oil and gas drilling is the potential for groundwater contamination by hydraulic fracturing.[8] About 90% of U.S. wells, and almost all in Colorado, are hydraulically fractured by forcing a mixture of water, sand, and chemicals into a well to crack rock and release oil and gas.[9] Approximately 183,000 Colorado households get their water from residential wells, and 398,000 Coloradans live in a community that gets its municipal water from groundwater.[10] 2,670 Colorado farms (8.7% of all statewide) irrigate some 1,000,000 acres of cropland with groundwater.[11] Both the Sierra Club and NRDC oppose expanding hydraulic fracturing, claiming the practice poses a potential threat to groundwater.[12]

The potential for hydraulic fracturing fluids to contaminate groundwater is hotly contested between drilling advocates and opponents of hydraulic fracturing.[13] Colorado oil and gas drillers are required to disclose the chemicals they use in hydraulic fracturing.[14] The leakage of compounds used in high volume hydraulic fracturing upward from the target shale has not been documented.[15] A study by University of Colorado researchers tested whether 659 chemicals

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[6] *2017 Annual Report*, COLORADO OIL AND GAS CONSERVATION COMMISSION (Dec. 30, 2017), https://www.colorado.gov/pacific/sites/default/files/SB181arCOGCC2017_1.pdf.

[7] *In re Wellington Operating Co*., Docket No. 151200689 (Dec. 11, 2015). https://cogcc.state.co.us/orders/orders/1/195.html.

[8] Amy Mall, Kate Siding & Brianna Mordick, *Hydraulic Fracturing Can Potentially Contaminate Drinking Water Sources*, NRDC (July 5, 2012), https://www.nrdc.org/resources/hydraulic-fracturing-can-potentially-contaminate-drinking-water-sources.

[9] Mark Jaffe, *Hydraulic fracking linked for first time to groundwater pollution*, DENVER POST (Dec. 8, 2011), https://www.denverpost.com/2011/12/08/hydraulic-fracking-linked-for-first-time-to-groundwater-pollution/.
[10] *Groundwater Use in Colorado*, NATIONAL GROUND WATER ASSOCIATION (Feb. 2020), https://www.ngwa.org/docs/default-source/default-document-library/states/co.pdf.

[11] *Id.*

[12] Gabby Brown, *Flawed and Incomplete USGS Study Ignores Key Fracking Risks*, SIERRA CLUB (June 1, 2017), https://content.sierraclub.org/press-releases/2017/06/flawed-and-incomplete-usgs-study-ignores-key-fracking-risks; Amy Mall, *supra* note 8.

[13] Andrew Maykuth, *'Gasland' documentary fuels debate over natural gas extraction*, PHILADELPHIA INQUIRER (June 24, 2010, 3:01 AM), https://www.inquirer.com/philly/news/special_packages/inquirer/marcellus-shale/20100624__Gasland__documentary_fuels_debate_over_natural_gas_extraction.html.

[14] The Associated Press, *Colorado requires disclosure of fracking chemicals*, DENVER POST (Dec. 13, 2011) https://www.denverpost.com/2011/12/13/colorado-requires-disclosure-of-fracking-chemicals/.

[15] Garth T. Llewellyn, Frank Dorman, J. L. Westland, D. Yoxtheimer, Paul Grieve, Todd Sowers, E. Humston-Fulmer, Susan L. Brantley, *Evaluating a groundwater supply contamination incident attributed to Marcellus Shale gas development*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (May 2015) 112 (20) 6325-6330; DOI: 10.1073/pnas.1420279112, https://www.pnas.org/content/112/20/6325.

identified by the EPA in its FracFocus chemical disclosure website could reach a water well under a "fast transport scenario."[16] This worst-case fast transport scenario would require a well casing failure in a porous aquifer horizontal to a water well ninety-four meters away (the average setback distance required in the U.S.).[17] The study found that of the fifteen chemicals likely to reach the water well in significant quantities, three (acrylamide, ethylbenzene, and xylenes) had EPA National Primary Drinking Water Regulations standards for maximum concentration.[18] However, none of the three chemicals were reported in more than 3.2% of all FracFocus disclosures.[19]

Another concern is that "produced water" will provide a vector for saline groundwater to reach shallower freshwater aquifers and surface water.[20] Produced water is water produced as a byproduct of oil and gas extraction. Produced water, like oil and oil-water condensate, is exempted from the federal Resource Conservation and Recovery Act and therefore subject to COGCC jurisdiction.[21] This previously trapped groundwater has very high sulfate and sodium chloride levels from interaction with Colorado's marine-deposited shale.[22] Colorado oil and gas wells produce twenty-five million barrels of saline water per month, which must be concentrated in evaporation ponds, injected into deep low-quality aquifers, or treated and disposed of into surface water.[23]

The third and perhaps the most litigated concern is potential methane seepage from oil and gas wells to groundwater. Methane from natural gas has been released into Colorado groundwater due to improper drilling practices, albeit very infrequently.[24] Natural gas is

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[16] Jessica D. Rogers, Troy L. Burke, Stephen G. Osborn, and Joseph N. Ryan, *A Framework for Identifying Organic Compounds of Concern in Hydraulic Fracturing Fluids Based on Their Mobility and Persistence in Groundwater*, ENVIRONMENTAL SCIENCE & TECHNOLOGY LETTERS (2015) *2* (6), 158-164 DOI: 10.1021/acs.estlett.5b00090, https://pubs.acs.org/doi/pdf/10.1021/acs.estlett.5b00090.

[17] *Id*. at 159.

[18] *Id*. at 160.

[19] *Id*. at 162.

[20] Lauren Donovan, *Study indicates lingering saltwater contamination in oil patch*, BISMARCK TRIBUNE (Apr. 27, 2016), https://bismarcktribune.com/news/state-and-regional/study-indicates-lingering-saltwater-contamination-in-oil-patch/article_d62aaa65-c9ff-5ddb-bb40-8e0983efdde3.html.

[21] *2017 Annual Report*, COLORADO OIL & GAS CONSERVATION COMMISSION (Dec. 30, 2017), https://www.colorado.gov/pacific/sites/default/files/SB181arCOGCC2017_1.pdf.

[22] Gabriel LaHue, *Saline soils and water quality in the Colorado River Basin: Natural and anthropogenic causes*, UC DAVID CENTER FOR WATERSHED STUDIES (Winter 2017), https://watershed.ucdavis.edu/education/classes/files/content/page/Saline%2Bsoils%2Band%2Bthe%2BColorado%2BRiver%2B_Revised_.pdf.

[23] *Id.*

[24] Bruce Finley, *Colorado firewater: mostly natural, industry leaks seldom to blame, CU study finds*, DENVER POST (July 11, 2016), https://www.denverpost.com/2016/07/11/flammable-water-not-gas-leaks-colorado/.

primarily composed of methane, and natural or manmade cracks from shale to groundwater formations may create methane pockets.[25] Dissolved methane readily leaves water when exposed to air.[26] Although methane is nontoxic, the release of methane indoors can lower oxygen levels and make it difficult to breathe.[27] There is also a danger of fire or explosion if the level of methane in indoor air reaches 5%.[28]

Potential Groundwater Contamination

Of the three prominent potential contaminants—fracturing fluid, produced water, and methane—methane is the only contaminant that has been confirmed to have seeped into Colorado groundwater from oil and gas drilling.[29]

The COGCC maintains that scientists can determine the origin of methane in Colorado aquifers and wells.[30] Methane in a water source will either be biogenic or thermogenic.[31] Biogenic methane is created by the decomposition of organic material through fermentation and has historically been present in the well water of the Denver-Julesburg Basin.[32] Thermogenic methane is produced by applying heat to organic matter and is formed in rock formations deep underground.[33] Thermogenic methane generally reaches groundwater through an oil and gas well.[34] Therefore, in Colorado, the presence of thermogenic methane in groundwater is generally associated with oil and gas development, while biogenic methane is not.[35]

In the Denver-Julesburg Basin, one study examined thirty-two complaints to the COGCC concerning forty-two water wells that contained thermogenic methane originating from

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[25] Aaron G. Cahill, Colby M. Steelman, Olenka Forde, Olukayode Kuloyo, S. Emil Ruff, Bernhard Mayer, K. Ulrich Mayer, Marc Strous, M. Cathryn Ryan, John A. Cherry & Beth L. Parker, *Mobility and persistence of methane in groundwater in a controlled-release field experiment*, NATURE GEOSCIENCE 10**,** 289–294 (2017), https://doi.org/10.1038/ngeo2919.

[26] *Methane in Groundwater*, ILLINOIS DEPARTMENT OF PUBLIC HEALTH (last accessed: Apr. 20, 2020), http://www.dph.illinois.gov/topics-services/environmental-health-protection/private-water/methane-groundwater.

[27] *Id.*

[28] *Id.*

[29] *See* Llewellyn, *supra* note 15.

[30] *COGCC Gasland Correction Document*, COLORADO OIL AND GAS CONSERVATION COMMISSION (Oct. 29, 2010), https://cogcc.state.co.us/documents/library/Technical/Public_Health_Safety_and_Welfare/Hydraulic_Fracturing/GASLAND%20DOC.pdf.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

underlying oil and gas producing formations.[36] The complaints of the presence of thermogenic methane occurred at a rate of about two cases per year from 2001 to 2014.[37] Of the twenty-nine complaints with documentation, fifteen were unresolved or still under investigation.[38] Ten were attributed to a wellbore barrier failure, one was suspected but unconfirmed wellbore barrier failure, and three complainants settled with the oil and gas operator privately and no information about the cause of gas migration was available.[39] All eleven cases of attributed or suspected wellbore failure involved vertical wells drilled before 1993, seven of which were hydraulically fractured.[40] All eleven wells had short surface casings and uncemented intermediate sections.[41] The analysis of COGCC complaints suggests that wellbore barrier failure, not high-volume hydraulic fracturing in horizontal wells, is the main cause of thermogenic methane migration in the Denver-Julesburg Basin.

The study authors estimated the low-end wellbore failure rate at 0.06% of the 54,000 oil and gas wells in the basin.[42] This failure rate conforms to the findings of a study of the Wattenberg Field that lies within the Denver-Julesburg Basin.[43] Among the 16,828 wells of the Wattenberg Field, the authors identified ten catastrophic failures for a catastrophic failure rate of 0.06%.[44] The study authors defined a "catastrophic failure" as contamination of a drinking water aquifer (i.e., the presence of thermogenic gas in a drinking water well) and evidence of a well defect such as casing leaks or an exposed intermediate gas zone.[45] Nine out of ten catastrophic failures came from wells that were 1) either under or over-pressurized, 2) had exposed

[36] Owen A. Sherwood, Jessica D. Rogers, Greg Lackey, Troy L. Burke, Stephen G. Osborn & Joseph N. Ryan, *Groundwater methane in relation to oil and gas development and shallow coal seams in the Denver-Julesburg Basin of Colorado*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (July 2016), 113 (30) 8391-8396; DOI: 10.1073/pnas.1523267113.

[37] *Id.* at 8391.

[38] *Id.* at 8394.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* The study authors assumed that all thirty-two complaints of the presence of thermogenic methane resulted from wellbore failures.

[43] U.S. EPA, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE U.S. (Dec. 2016), https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990.

[44] *Id.* at 6-20, 10-15.

[45] *Id.*

intermediate gas zones, and 3) had too short a casing to cover a deep aquifer that was only discovered in 1994.[46]

The Wattenberg Field study also evaluated "barrier failures" that were considered to have occurred when there were signs of a failure, but no contamination.[47] 401 wells (2.4%) showed signs of failure but 368 of those barrier failures occurred in wells demonstrating all three characteristics of over/under pressurization, gas zone exposure, and short casings.[48] The Wattenberg Field study confirms that groundwater contamination has been rare and is largely limited to improperly maintained, older wells.[49]

The studies of the Denver-Julesburg Basin and the Wattenberg Field mirror studies done in other gas-producing states. An analysis of 1701 Pennsylvania wells in the Marcellus Shale formation returned similar results.[50] The methane analysis found that shale-gas extraction in northeastern Pennsylvania has not resulted in regional gas impacts on drinking water resources.[51] Between 1993 and 2008, the Ohio Division of Mineral Resources Management and the Texas Railroad Commission did not identify a single incident of groundwater contamination caused by hydraulic fracturing.[52] The study of hydraulic fracturing in Texas and Ohio was conducted by the Groundwater Protection Council, of which the COGCC, the Colorado Water Quality Control Division, and the Colorado Department of Natural Resources Division of Water Resources are members.[53]

Groundwater Contamination Litigation

The three settlements in the Denver-Julesburg Basin and a Dimock, Pennsylvania groundwater suit demonstrate that well operators may incur settlement costs for wells that were improperly maintained. Between 2009 and 2017, federal courts considered a claim of methane and natural gas contamination of drinking water in the Marcellus Shale formation of

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See* U.S. EPA, *supra* note 43.

[50] Lisa J. Molofsky, John A. Connor, Albert S. Wylie, Tom Wagner & Shahla K. Farhat, *Evaluation of Methane Sources in Groundwater in Northeastern Pennsylvania*, GROUND WATER (2013), 51(3), 333–349.

[51] *Id.*

[52] Scott Kell, *State Oil and Gas Agency Groundwater Investigations And Their Role in Advancing Regulatory Reforms A Two-State Review: Ohio and Texas*, GROUND WATER PROTECTION COUNCIL (Aug. 2011), http://www.gwpc.org/sites/default/files/State%20Oil%20%26%20Gas%20Agency%20Groundwater%20Investigations.pdf.

[53] *State Membership*, GROUND WATER PROTECTION COUNCIL (last accessed: Apr. 20, 2020), http://www.gwpc.org/sites/default/files/files/State-Agency-Links.pdf.

Pennsylvania.[54] In 2009 fifteen Dimock families alleged that Calbot Oil and Gas Corp. had contaminated their drinking water supplies.[55] In November 2009 Calbot was fined $120,000 by the State of Pennsylvania as part of a consent order that found Calbot allowed the unpermitted discharge of natural gas into groundwater among other violations.[56] The three oil and gas wells that were found to have discharged natural gas and methane into groundwater were found to have an insufficient or improperly cemented casing.[57] A Pennsylvania jury returned a $4.24 million verdict for the two families who did not settle with Calbot.[58]

U.S. Magistrate Judge Martin Carlson of the Middle District of Pennsylvania overturned the jury verdict and ordered a new trial on the grounds of a paucity of proof of damages, improper conduct by the plaintiff's attorney, and a finding that the verdict of liability was against the weight of the evidence.[59] The two remaining families subsequently settled with Calbot.[60]

Colorado Tort Liability For Groundwater Contamination

The Dimock lawsuit may have played out differently in Colorado courts. Colorado tort law offers plaintiffs alleging groundwater contamination from oil and gas drilling potential recovery through nuisance, negligence, and trespass actions.[61] The Colorado Oil and Gas Conservation Act (the "Act") preserves common law remedies for damages a person may have against a well operator who has violated a provision of the Act or a COGCC rule.[62] Additionally, the Act permits a private party to seek injunctive relief, under certain conditions, against a defendant who has allegedly violated, or threatens to violate, provisions of the Act or COGCC rules.[63]

Nuisance

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[54] Jon Hurdle, *Last two Dimock families settle lawsuit with Cabot over water*, STATEIMPACT PENNSYLVANIA (Sep. 26, 2017), https://stateimpact.npr.org/pennsylvania/2017/09/26/last-two-dimock-families-settle-lawsuit-with-cabot-over-water/.

[55] *Id.*

[56] *In re Cabot Oil and Gas Corp*., Consent Order and Agreement, Commonwealth of Pennsylvania Department of Environmental Protection (4 Nov. 2009), https://s3.amazonaws.com/propublica/assets/natural_gas/final_cabot_co-a.pdf.

[57] *Id*. at 3.

[58] Susan Phillips, *Federal jury awards $4.24 million to Dimock families in fracking case*, STATEIMPACT PENNSYLVANIA (Mar. 10, 2016), https://stateimpact.npr.org/pennsylvania/2016/03/10/federal-jury-awards-4-24-million-to-dimock-families-in-fracking-case/.

[59] *Ely v. Cabot Oil & Gas Corp.*, No. 3:09-CV-2284, 2017 U.S. Dist. LEXIS 49075 (M.D. Pa. Mar. 31, 2017).

[60] Hurdle, *supra* note 54.

[61] *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 924–25 (Colo. 1997), *as modified on denial of reh'g* (Oct. 20, 1997).

[62] *See Id*.

[63] *Id.* at 925.

A Colorado claim for nuisance is predicated upon a substantial invasion of a plaintiff's interest in the use and enjoyment of his property when such invasion is: (1) intentional and unreasonable; (2) unintentional and otherwise actionable under the rules for negligent or reckless conduct; or (3) so abnormal or out of place in its surroundings as to fall within the principle of strict liability.[64] Contamination from a faulty well casing is unlikely to be intentional, ruling out the first prong of nuisance. Maryland proposed imposing strict liability on hydraulic fracturing, and the Utah Supreme Court imposed strict liability where an oil well contaminated a domestic drinking water well.[65] However, Colorado has yet to adopt such a rule.[66] Therefore, to prevail on a nuisance claim for groundwater contamination the cause must be otherwise actionable under the rules for negligent or reckless conduct.[67] As explained below, Colorado law permits nuisance claims to be brought alongside negligence claims for subsurface contamination.

Negligence

In Colorado, a prima facie case of negligence is established when the plaintiff proves the following elements: the existence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, injury to the plaintiff, and a causal relationship between the breach and the injury.[68] Violations of COGCC rules are valid, but not conclusive, evidence that a lessee breached a duty owed to the surface owner.[69] If the violation is the proximate cause of injury, the trier of fact is therefore permitted, but not required, to conclude that the lessee's conduct was negligent.[70] COGCC Rule 317e provides: "The casing and cement program for each well must prevent oil, gas, and water from migrating from one formation to another behind the casing. Groundwater bearing zones penetrated during drilling must be protected from the infiltration of hydrocarbons or water from other formations penetrated by the well."[71] Site remediation as mandated by the COGCC requires reducing the concentration of contaminants in water or soil to the extent

[64] *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001).

[65] S.B. 458, 2015 Leg., 435th Sess. (Md. 2015); *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 275 (Utah 1982).

[66] *See Gerrity Oil* 946 P.2d 913 at 930 ("[T]he legislature has clearly indicated that its creation of a regulatory scheme governing the conduct of oil and gas operators is not intended to abrogate the rule of reasonable surface use and substitute a strict liability standard for violations").

[67] *See Pub. Serv. Co. of Colorado*, 27 P.3d 377.

[68] *Gerrity Oil* 946 P.2d 913 at 929.

[69] *Id.* at 931.

[70] *Id.*

[71] COGCC Rule 317e (Jan. 14, 2020).

necessary to ensure compliance with applicable groundwater standards.[72] Because COGCC rules require the protection of groundwater from contamination and groundwater remediation, failure to do so may be the basis of a negligence or nuisance claim under Colorado law.[73]

Trespass

The elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property.[74] The migration of methane from oil and gas wells to groundwater may create a continuing trespass. The Colorado Supreme Court in *Hoery v. United States* determined that the continued migration of contaminants from a defendant's property to a plaintiff's property constituted a continuing trespass and nuisance.[75] In certifying a question of Colorado tort law for the United States Court of Appeals for the Tenth Circuit, the Court found that the United States committed a continuing trespass and nuisance when toxic chemicals from a military base seeped into groundwater, contaminating the plaintiff's water well, soil, and groundwater.[76]

Hoery also carries great significance in groundwater contamination cases because it controls when the statute of limitations expires.[77] Due to the difficulty of detecting and then assessing the extent of groundwater contamination, plaintiffs may be filing suit several years after the contamination first occurred.[78] Under Colorado law, a tortfeasor's liability for continuing trespass and nuisance creates a new cause of action each day the property invasion continues.[79] Hence, the alleged tortfeasor has an incentive to stop the property invasion and remove the cause of damage.[80]

Bonding and Insurance Requirements

Surface owner protection bonds and COGCC-mandated general liability insurance may cover suits by landowners deprived of their groundwater if the groundwater withdrawals are subject to the property right of prior appropriation. Prior appropriation grants an entitlement "to

[72] COGCC Rule 909 (Jan. 14, 2020).

[73] *See Gerrity Oil*, 946 P.2d 913.

[74] *Public Serv. Co. of Colorado*, 27 P.3d at 389.

[75] *Hoery v. United States*, 64 P.3d 214 (Colo. 2003).

[76] *Id.* at 216.

[77] *See id.* at 223.

[78] *See, e.g., id.*

[79] *Id.*

[80] *Id.*

divert a specified quantity of water for a specified beneficial use with a specific priority relative to other users from the same source."[81] Colorado courts have repeatedly held that the prior appropriation entitlement is a property right.[82] Under COGCC Rule 702, operators must post a surface owner protection bond of $2,000 per well on non-irrigated land and $5,000 per well on irrigated land, or operators may post a state-wide bond of $25,000.[83] COGCC Rule 708 further provides that all operators maintain $1,000,000 per occurrence general liability insurance for "property damage and bodily injury to third parties."[84]

It is unclear whether the minimum policy would have been sufficient to cover the Denver-Julesburg Basin methane settlements. The confidential nature of the Denver-Julesburg Basin settlements and the Dimock settlements makes it difficult to determine the monetary costs of settling methane claims. Determining the per-incident costs of the settlements could prove useful in evaluating whether the COGCC's current minimum requirement of $1,000,000 in per-incident general liability insurance is sufficient. One solution may be to require oil and gas operators to disclose such settlements to the COGCC, with COGCC keeping any such disclosures confidential.

A potential source of well failures is the increasing number of "orphan wells" abandoned by insolvent operators. The COGCC reported to the governor that, as of July 1, 2019, there are a total of 275 orphaned wells and 422 associated orphaned sites in Colorado.[85] One operator, Red Mesa, is responsible for fifty-two wells in the Colorado orphaned well list.[86] The COGCC ordered Red Mesa Holdings to pay $250,000 for cleanup costs, but the company instead declared

[81] *See* Stephen N. Bretsen, *Rainwater Harvesting Under Colorado's Prior Appropriation Doctrine: Property Rights and Takings*, 22 FORDHAM ENVTL. L. REV. 159, 182 (2011) (quoting George Vranesh, VRANESH'S COLORADO WATER LAW 8 (James N. Corbridge & Teresa A. Rice eds., rev. ed. 1999)).

[82] *See Bayou Land Co. v. Talley*, 924 P.2d 136, 150 (Colo. 1996) ("In Colorado, it is well settled that a water right is a property right separate and apart from the land on which it is used").

[83] COGCC Rule 702 (Jan. 14, 2020).

[84] COGCC Rule 708 (Jan. 14, 2020).

[85] Jeff Robins, *Annual Comprehensive Orphan Wells and Orphaned Sites List*, COLORADO OIL & GAS CONSERVATION COMMISSION (July 1, 2019), https://cogcc.state.co.us/documents/reg/Enforcement/Orphan%20Wells/COGCC_Orphaned_Well_Sites_List_20190701.pdf?utm_source=Colorado+Department+of+Natural+Resources&utm_campaign=9ee688308b-EMAIL_CAMPAIGN_2019_07_01_05_00&utm_medium=email&utm_term=0_f765d898fc-9ee688308b-29144533.

[86] *Id.*

bankruptcy.[87] Another operator, Benchmark Energy LLC is responsible for forty-two wells but abandoned operations in Colorado rather than pay a $1.2 million fine by the COGCC.[88]

The COGCC estimates that the typical orphan well costs $40,000 to plug, however, this cost may increase depending on location and the amount of site information available.[89] One November 2018 survey of orphan well-plugging contracts in California found an average cost of $68,000 to plug orphan wells.[90] A survey of contracts awarded to plug orphan wells in Ohio found an average cost of more than $110,000 per well in 2019.[91]

In addition to the surface owner protection bonds, the COGCC requires operators to post a $10,000 individual bond for wells less than 3,000 feet deep and a $20,000 individual bond for wells equal to or more than 3,000 feet deep, to provide for the protection of the soil, proper plugging and abandonment of the well, and reclamation of the site.[92] Alternatively, the operator may post a $60,000 state-wide blanket bond for less than 100 wells, or a $100,000 state-wide blanket bond for more than 100 wells.[93] The bond requirements have been criticized as low relative to the potential costs to the State of Colorado to plug the wells.[94]

When oil and gas operators go bankrupt or pack up and leave the state, Colorado taxpayers are left on the hook. In 2018 Colorado Governor John Hickenlooper allocated $5 million in state funds to cover the cost of plugging orphan wells.[95] The most intuitive move is to increase the COGCC bond requirement to the average cost of plugging and capping a well. The Denver-Julesburg Basin and Wattenberg Field studies demonstrate that the primary danger to groundwater from oil and gas drilling is improperly built or maintained wells. A sensible starting

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[87] Johnathan Romeo, *Colorado launches effort to plug abandoned wells in La Plata County*, DURANGO HERALD (Mar. 11, 2020), https://durangoherald.com/articles/317772-colorado-launches-effort-to-plug-abandoned-wells-in-la-plata-county.

[88] Jesse Paul, *Colorado fines Logan County driller $1.2 million, yanks its permit to operate*, DENVER POST (June. 30 2016), https://www.denverpost.com/2016/06/30/benchmark-energy-fined-permit-colorado/.

[89] Johnathan Romeo, *Colorado launches effort to plug abandoned wells in La Plata County*, Durango Herald (Mar. 11, 2020), https://durangoherald.com/articles/317772-colorado-launches-effort-to-plug-abandoned-wells-in-la-plata-county.

[90] Judson Boomhower, et al., *Orphan Wells in California: An Initial Assessment of the State's Potential Liabilities to Plug and Decommission Orphan Oil and Gas Wells*, CALIFORNIA COUNCIL ON SCIENCE & TECHNOLOGY (Nov. 2018), https://ccst.us/wp-content/uploads/CCST-Orphan-Wells-in-California-An-Initial-Assessment.pdf.

[91] Mark Olande, *Cleaning up after Ohio's oil and gas industry brings a growing price tag,* ENERGY NEWS NETWORK (Jan. 15, 2020), https://energynews.us/2020/01/15/midwest/cleaning-up-after-ohios-oil-and-gas-industry-brings-a-growing-price-tag/.

[92] COGCC Rule 706 (Jan. 14, 2020).

[93] *Id.*

[94] Tony Dutzik, Benjamin Davis, Tom Van Heeke, Frontier Group & John Rumpler, *Who Pays the Costs of Fracking? Weak Bonding Rules for Oil and Gas Drilling Leave the Public at Risk*, ENVIRONMENT COLORADO RESEARCH & POLICY CENTER (July 16, 2013) https://frontiergroup.org/reports/fg/who-pays-costs-fracking.

[95] Romeo, *supra* note 87.

point may be a $40,000 per well bond requirement, with the COGCC permitted to adjust the requirement based on the anticipated costs of plugging the well.

In 2019 Colorado passed a landmark reform of Colorado oil and gas law, SB 19-181.[96] The legislation mandated that the COGCC consider 1) increasing financial assurance for inactive wells and wells transferred to a new owner, 2) requiring a financial assurance account, which must remain tied to the well in the event of a transfer of ownership, to cover future costs of plugging, reclaiming, and remediating the well and 3) creating a pooled fund to address orphaned wells for which no owner, operator, or responsible party is capable of covering the costs of plugging, reclamation, and remediation.[97] The COGCC has set the goal of finalizing new financial assurance rules in spring 2021.[98]

Federal Lands in Colorado

Pursuant to a memorandum of understanding between the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), and the State of Colorado, all drilling and oil and gas extraction operations on BLM and USFS land in Colorado are subject to both state and federal rules.[99] The USFS manages 14.5 million acres in Colorado, and the Department of Defense, Fish and Wildlife Service, and National Park Service together manage 1.3 million acres of federal land in Colorado.[100] The BLM manages 8.3 million acres of public lands and 27 million acres of federal mineral estate in Colorado (equivalent to 40% of the state's surface area), including under USFS lands.[101] BLM leases require that all wells be plugged before they are abandoned and require a $10,000 minimum bond per lease.[102] Oil and gas operations on federal and tribal lands are covered by federal, not state, bonding requirements.[103]

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[96] Dale Ratliff, *Senate Bill 19-181: Colorado enacts first-of-its-kind oil and gas legislation*, American Bar Association (Oct. 25, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2019-2020/november-december-2019/senate-bill/.

[97] S.B. 19-181, 71st Gen. Assemb., Reg. Sess. (Co. 2019).

[98] Sam Brasch, *Colorado Has A Brand New Set Of Oil And Gas Rules With A Focus On Regulating The Industry*, COLORADO PUBLIC RADIO (Nov. 23, 2020), https://www.cpr.org/2020/11/23/colorado-has-a-brand-new-set-of-oil-and-gas-rules-with-a-focus-on-regulating-the-industry/.

[99] Memorandum of Understanding Among Bureau of Land Management, Colorado State Office; U.S. Forest Service, Rocky Mountain Region; and Colorado Oil and Gas Conservation Commission (Jun. 2, 2019), https://www.blm.gov/sites/blm.gov/files/2019.06.25_BLM%20COGCC%20USFS%20Permitting%20MOU.pdf.

[100] CONGRESSIONAL RESEARCH SERVICE, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (Feb. 21, 2020).

[101] *What We Manage*, BUREAU OF LAND MANAGEMENT (last accessed Apr. 16, 2020), https://www.blm.gov/about/what-we-manage/Colorado.

[102] *General Oil and Gas Leasing Instructions*, BUREAU OF LAND MANAGEMENT (last accessed: Apr. 16, 2020), https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/general-leasing.

[103] *Permitting & Technical Services Unit Financial Assurance (Bonding)*, COLORADO OIL & GAS CONSERVATION COMMISSION (June 30, 2020), https://cogcc.state.co.us/documents/about/TF_Summaries/GovTaskForceSummary_Permitting_Bonding.pdf.

If the well operator is still solvent, major violations of BLM regulations and the Federal Oil and Gas Royalty Management Act could result in a fine of $1,000 per day to $52,000 per day, depending on the violation.[104] If the violation goes uncorrected for twenty days, the BLM may initiate lease termination proceedings and prohibit the removal of oil and gas from the lessee's well.[105] Additionally, any person who violates the terms of a BLM lease or oil and gas regulation included in 43 C.F.R. §3163.2(f) may be punished by a fine of not more than $50,000 and/or by imprisonment for not more than two years.[106]

However, like the COGCC, the BLM has been criticized for having bond requirements far below the cost of reclaiming oil and gas wells. In 2011 the Government Accountability Office (GAO) issued a scathing report that concluded the $10,000 per lease bond is insufficient to cover the plugging and reclamation costs for one well. The GAO reported that over the preceding twenty years, the BLM spent $3.8 million to reclaim 295 orphaned wells, with plugging costs for some wells reaching as high as $100,000.[107] Between 2010 and 2017 the number of unplugged orphaned wells on BLM lands increased from 144 to 219.[108]

Conclusion

Of the potential contaminants that could enter groundwater from hydraulic fracturing, only thermogenic methane has been confirmed to have entered Colorado groundwater. In all cases where the COGCC investigation reached a conclusion, improperly built or maintained wells were the most likely cause. A handful of settlements for methane contamination of domestic water wells have been reached in Colorado and Pennsylvania. COGCC rules relating to well casings and remediation may prove the basis for nuisance and negligence tort claims, and the Colorado Supreme Court has recognized a trespass claim for groundwater contamination. However, on both federal and non-federal lands, low bonding requirements and insolvent operators could prove a barrier to the proper maintenance of wells and the recovery of damages. Increasing bonding requirements would permit the BLM and the COGCC to more quickly and easily repair the orphaned wells which threaten methane contamination.

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[104] 43 C.F.R. §3163.1-3 (2004).

[105] *Id*.

[106] 43 C.F.R. §3163.3 (2004).

[107] GOVERNMENT ACCOUNTABILITY OFFICE, OIL AND GAS BONDS: BLM NEEDS A COMPREHENSIVE STRATEGY TO BETTER MANAGE POTENTIAL OIL AND GAS WELL LIABILITY (Feb. 2011).

[108] GOVERNMENT ACCOUNTABILITY OFFICE: BUREAU OF LAND MANAGEMENT NEEDS TO IMPROVE ITS DATA AND OVERSIGHT OF ITS POTENTIAL LIABILITIES (May 16, 2018).

Applicant Details

First Name	**Travis**
Last Name	**Hahn**
Citizenship Status	**U. S. Citizen**
Email Address	**tahahn@law.gwu.edu**
Address	**Address** Street **1111 11th St. NW** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**203-295-5025**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2017**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 16, 2021**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**GW International Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California, District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kovacic, William
wkovacic@law.gwu.edu
202 994 8123
Dickinson, Laura
ldickinson@law.gwu.edu
Glicksman, Robert
rglicksman@law.gwu.edu
202-994-4164

References

Laura Dickinson (GW Law Professor and RA Supervisor)
(202) 994-0376
ldickinson@law.gwu.edu.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Travis Hahn
1111 11th St. NW
Washington, D.C. 20001

June 20, 2023

The Honorable Judge P. Casey Pitts
Robert F. Peckham Federal Building
& United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts,

I am an Attorney Advisor at the Federal Communications Commission (FCC) and a Highest-Honors (top 3%) graduate of the George Washington University Law School, where I was the Online Editor of the *George Washington International Law Review*. I was one of five attorneys out of around 700 selected for the FCC's highly competitive entry-level Attorney Honors Program. While at the FCC I have gained substantial experience drafting rules, regulations, and Commission orders, for public consumption. I am writing to apply for a clerkship in your chambers for either the 2023 or 2024 terms.

After clerking, I hope to pursue opportunities in public-interest litigation in California, working for legal non-profit organizations such as the Electronic Frontier Foundation, American Civil Liberties Union, or the California Department of Justice. Given my interest in public interest litigation, and plan to practice in the bay area after clerking I am particularly interested in clerking in your chambers.

Enclosed please find my resume, law school transcript, writing samples, and list of references. Given the timeframe of the 2023 clerkship, I am currently in the process of obtaining permission from past legal employers to use them as a reference. A legal employer reference will be available upon request soon.

Please let me know if I can provide any additional information.

Thank you for your consideration.

Respectfully,
Travis Hahn

Travis Hahn

1111 11th St. NW, Washington, D.C. |203-295-5025| thahn@law.gwu.edu

Education

The George Washington University Law School — **Washington, D.C.**
Juris Doctor — May 2021
GPA: 3.851 Rank: 23/547
Honors: Highest Honors (top 3%), Order of the Coif (top 10%), George Washington Scholar (top 1-15%): Fall 2018, Spring 2019, Fall 2019, Fall 2020, Spring 2021, Pro Bono Dean's Certificate.
Activities: Online Editor, *The George Washington International Law Review*.
Publications: *Saving the Global Internet: Towards a Rights-Based Approach to Regulating Cross Border Data Transfers*, 53 GEO. WASH. INT'L L. REV 357 (2021).

The George Washington University — **Washington, D.C.**
Bachelor of Arts in International Affairs and Political Science, Minor in Economics — May 2017
Honors: Internal Affairs VP & Web Master, Sigma Iota Rho (International Affairs Honors Fraternity).

Relevant Experience

Federal Communications Commission, Wireline Competition Bureau, — **Washington, D.C.**
Honors Attorney — September 2021–January 2022
Attorney Advisor — January 2022–Present

- Drafted sections of seven Commission level rulemakings implementing the Affordable Connectivity Program, a $14.2 billion broadband affordability program.
- Conducted legal research and drafted memoranda on issues of telecommunications and administrative law.
- Interfaced with interested stakeholders and provided guidance related to Commission rules and the Infrastructure Investment and Jobs Act's broadband sections.

National Telecomm. & Info. Admin., Office of Policy Analysis & Development, — **Washington, D.C.**
Legal Intern — January–May 2021

Consumer Financial Protection Bureau, Office of Regulations, — **Washington, D.C.**
Legal Intern — August–December 2020

Professor Laura Dickinson, — **Washington, D.C.**
Research Assistant — October 2020–May 2021

U.S. Department of Justice, Antitrust Division, — **Washington, D.C.**
Summer Law Intern Program (SLIP) Intern — May–August 2020

U.S. Securities and Exchange Commission, Division of Enforcement, — **Washington, D.C.**
1L Honors Intern — May–August 2019

Forensic Risk Alliance, — **Washington, D.C.**
Intern — January–August 2018

Carnegie Endowment for International Peace, Cyber Policy Initiative, — **Washington, D.C.**
Intern — July–September 2017
Research Assistant — October 2017–January 2018

Other Experience

2023 National Telecommunications and Technology Moot Court Competition, Briefs Judge

Bar Membership

California, Admitted January 2022.
District of Columbia, Admitted January 2023.

Interests

MLB (Red Sox/Nationals), Reading (post-war history, presidential biography), Hiking, Running (5k), Landscape Photography, Tennis.

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G40915922
Date of Birth: 22-MAY

Date Issued: 10-MAY-2022

Record of: Travis A Hahn

Page: 1

Student Level: Law
Admit Term: Fall 2018

Issued To: TRAVIS HAHN
TAHAHN@GWU.EDU

Current College(s):Law School
Current Major(s): Law
Concentration(s): Business and Finance Law

Degree Awarded: J D 16-MAY-2021
With Highest Honors
Major: Law
Area of Concentration: Business and Finance Law

Degree Awarded: Bachelor of Arts 21-MAY-2017
Major: International Affairs
Major: Political Science
Minor: Economics
Area of Concentration: Asia

EXPERIENTIAL REQUIREMENT MET
WRITING REQUIREMENT MET (6659)
JD RANK: 23/547

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2018			
Law School			
Law			
LAW 6202	Contracts I Schooner	3.00	A-
LAW 6206	Torts Suter	4.00	A
LAW 6210	Criminal Law Weisburd	3.00	A-
LAW 6212	Civil Procedure I Colby	3.00	A
LAW 6216	Legal Research And Writing Mcilmail	2.00	B+
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.778			
CUM 15.00 GPA-Hrs 15.00 GPA 3.778			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2019			
Law School			
Law			
LAW 6203	Contracts II Schooner	3.00	A-
LAW 6208	Property Nunziato	4.00	A
LAW 6213	Civil Procedure II Berman	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	B+
LAW 6217	Introduction To Advocacy Mcilmail	2.00	A-
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.756			
CUM 30.00 GPA-Hrs 30.00 GPA 3.767			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Fall 2019			
Law School			
Law			
LAW 6250	Corporations Manns	4.00	A-
LAW 6400	Administrative Law Glicksman	3.00	A+
LAW 6520	International Law Steinhardt	4.00	A
LAW 6657	Int'L Law Review Note	1.00	CR
LAW 6870	National Security Law Dickinson	3.00	A+
Ehrs 15.00 GPA-Hrs 14.00 GPA 4.048			
CUM 45.00 GPA-Hrs 44.00 GPA 3.856			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON PAGE 2 **********

Ed Edmundson
University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G40915922
Date of Birth: 22-MAY

Date Issued: 10-MAY-2022

Record of: Travis A Hahn

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2020			
LAW 6380	Constitutional Law II Ross	4.00	CR
LAW 6402	Antitrust Law Longwell	3.00	CR
LAW 6426	Public Law Seminar Goodfriend	2.00	CR
LAW 6486	Information Privacy Law Solove	3.00	CR
LAW 6657	Int'L Law Review Note	1.00	CR
Ehrs 13.00 GPA-Hrs 0.00 GPA 0.000			
CUM 58.00 GPA-Hrs 44.00 GPA 3.856			
Good Standing			
...			
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.			
Fall 2020			
LAW 6218	Prof Responsibility & Ethics	2.00	A
LAW 6230	Evidence Saltzburg	4.00	A
LAW 6252	Securities Regulation Manns	3.00	A
LAW 6659	International Law Review	1.00	CR
LAW 6668	Field Placement	1.00	CR
LAW 6671	Government Lawyering Cash	2.00	B
Ehrs 13.00 GPA-Hrs 11.00 GPA 3.818			
CUM 71.00 GPA-Hrs 55.00 GPA 3.848			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2021			
Law School			
Law			
Business and Finance Law			
LAW 6232	Federal Courts Gavoor	3.00	A
LAW 6261	Regulation Of Derivatives Waldman	2.00	A
LAW 6405	Sel Topics In Adv Antitrust Kovacic	2.00	B+
LAW 6470	Intellectual Property Karshtedt	3.00	A
LAW 6659	International Law Review Steinhardt	1.00	CR
LAW 6667	Advanced Field Placement Freuden	0.00	CR
LAW 6668	Field Placement Tillipman	3.00	CR
Ehrs 14.00 GPA-Hrs 10.00 GPA 3.867			
CUM 85.00 GPA-Hrs 65.00 GPA 3.851			
Good Standing			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	85.00	65.00	250.33	3.851
OVERALL	85.00	65.00	250.33	3.851

########## END OF DOCUMENT ##########

Ed Edmondson
University Registrar

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Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

NOTICE TO RECIPIENT

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DESIGNATION OF CREDIT
All courses are taught in semester hours.

TRANSFER CREDIT
Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM
All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School
Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN
The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF
THE WASHINGTON METROPOLITAN AREA
Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS
Undergraduate Grading System
A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System
(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System
A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System
H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit
http://www.gwu.edu/transcriptkey

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write on behalf of Travis Hahn, who has applied for a clerkship in your chambers. Mr. Hahn is a student in the J.D. program at the George Washington University Law School, and I recommend him to you with the greatest possible enthusiasm.

Two perspectives inform my assessment. First, Mr. Hahn took my introductory antitrust course in the Fall 2022 Semester, and he did truly superlative work. In a class of 80, he was one of my five best students. He wrote an excellent examination, and his comments in class were routinely superior in their grasp of technical doctrine and broader policy considerations. In all things, he applied his keen analytical skills with thoroughly professional work habits. I am convinced that Mr. Hahn has the mix of intellectual gifts and the propensity for hard work that predict excellence in a judicial clerk.

Second, to prepare this recommendation, I consulted with colleagues who have taught Mr. Hahn at George Washington. All shared my view that he has superior intellectual gifts and a highly conscientious approach to the study of law. They also emphasize what I have seen in the classroom and in conversations: Mr. Hahn has admirable personal sensibilities. He takes nothing for granted, and he approaches each task with a rare combination of great ability and humility. Mr. Hahn also has a degree of maturity and good judgment that one ordinarily sees only in an experienced practitioner. I am confident that he will be a welcomed member in your chambers.

I strongly support Mr. Hahn’s application, and I am pleased to elaborate upon these views if you wish.

Sincerely yours,

William E. Kovacic
Global Professor of Competition Law
The George Washington University Law School
(202) 994-8123
wkovacic@law.gwu.edu

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing to recommend my former student, Travis Hahn, for a clerkship in your chambers. Travis was one of the top students at George Washington University Law School (GW Law) – number 23 at graduation in his law school class of 546 – and has demonstrated stellar legal reasoning and writing skills. I give him my highest recommendation.

Travis enrolled in my national security law class in the fall of 2020, and he soon stood out as one of the best students in the class. The course is especially demanding because it covers many bodies of law (international and domestic, constitutional and statutory) and the legal issues are difficult and complex. Students must parse the intricacies of the Foreign Intelligence Surveillance Act (FISA), comprehend the detailed procedures related to criminal prosecutions in U.S. military commissions, as well as understand fundamental principles of constitutional law regarding separation of powers and the use of force. Furthermore, I demand a lot of the students in class, as I use the Socratic method to call on them every day, although I do also take volunteers. Travis is a somewhat shy, quiet, and modest person. He was not one of the students who volunteered to speak during the first days of class, and because he sat toward the back of the classroom, I didn't call on him until about two weeks into the semester. I remember, though, that when I did, I was immediately impressed. I asked him to analyze the seminal Youngstown steel seizure case, which forms the bedrock of the constitutional component of national security law. He gave the most lucid, clear articulation of each one of the multiple opinions that I have ever heard from a student in twenty-three years of law teaching. Moreover, he was immediately able to apply the approaches of the different concurring Youngstown Justices, such as Justice Jackson's tripartite framework and Justice Frankfurter's historical analysis, to multiple complex hypotheticals I threw at him in rapid succession. And his discussion of Youngstown was not an aberration. Throughout the semester, Travis interpreted the legal materials we discussed in class with similar precision, care, and analytic excellence. Furthermore, in addition to responding brilliantly when I called on him, he began to contribute quite a bit as a volunteer as well, much to the benefit of the entire class.

I was therefore not surprised when I discovered that Travis had written far and away the best exam in the class. This was a considerable feat, as the group consisted of an unusually strong group of students, some of whom were earning L.L.M.'s after working in the national security field as military lawyers, in the U.S. Congress, at the U.S. Department of State, or Central Intelligence Agency. Travis addressed every issue that I had buried with the fact-pattern issue-spotter questions – a significant accomplishment, as the diverse bodies of law covered make issue-identification particularly challenging in my exams. His analysis was also distinctively lucid and well-organized, as well as a sheer pleasure to read. It's the kind of exam that makes you happy to be a law professor, because you feel as if a student really did absorb everything you had to impart. His response to the so-called "policy" question I asked on the exam was also terrific. I had invited them to propose reforms to the Foreign Intelligence Surveillance Act (FISA). Travis offered truly thoughtful, nuanced, carefully reasoned proposals that he defended beautifully. It was particularly notable that he acknowledged, and responded to, the key counter-arguments to his position, which I believe is one of the hallmarks of good lawyering.

In addition to his impressive performance in the classroom, Travis was a quiet leader in the GW community and amassed significant internship and work experience as a law student as well. For example, Travis was an active member of the GW International Law Review in a year when the journal greatly expanded its scope and activities and served as the Online Editor in the following year. Furthermore, Travis worked as a legal intern with the Security and Exchange Commission, the Department of Justice's Antitrust Division, and at the Consumer Financial Protection Bureau. GW Law prides itself in providing internship opportunities for students, but even in this environment, the number of significant internships that Travis obtained stands out. I should also note that performing well in school on top of these types of demanding, prestigious, government internships can be a challenge for many students – but not for Travis.

It bears mentioning that Travis's strong writing skills found expression in his particularly ambitious and well-written note for the International Law Review, "Rethinking the Global Trade: Towards a Rights-Based Approach to Regulating Cross-Border Data Transfers." It was a timely and well-conceived topic, and Travis tackled it with the kind of precision, nuance, and care that is typical of his work. Notably, the International Law Review made the wise decision to publish the piece.

Finally, Travis' work experience after law school in the Honors Program at the U.S. Federal Communications Commission is impressive and would, I think, provide an excellent foundation for work as a law clerk. Based on all of my interactions with Travis, I am confident that he will be a pleasure to work with. He is collegial, professional, unfailingly well-prepared, and a strong, careful writer.

In sum, I think very highly of Travis. As someone who served as a law clerk both at the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court, I have a background to understand what is required to excel in a clerkship. If I were a judge, I would certainly interview Travis, and I recommend that you give his application very careful consideration.

Best regards,

Laura A. Dickinson

Laura Dickinson - ldickinson@law.gwu.edu

Oswald Symister Colclough Research Professor
and Professor of Law
The George Washington University Law School
(202) 994-0376
ldickinson@law.gwu.edu

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing to support Travis Hahn's application for a judicial clerkship in your office. Travis is a 2021 graduate of the George Washington University Law School, where I am a faculty member. Travis was a student in my Administrative Law class during his second year and received an A+ grade, which is as high a grade as I am allowed to give. I reserve this grade for students who have performed exceptionally well and give very few such grades. Travis's grade in my course is consistent with his performance in law school more generally; he graduated with a 3.851 GPA, in the top three percent of the class. Based on my experience with Travis in what many students found to be a difficult and challenging course (which is also likely to be highly relevant to many of the cases Travis would work on as a clerk) and his overall law school record to date, I highly recommend him to you.

In addition to his stellar classroom performance, Travis has considerable work experience that would serve him well in a judicial clerkship. Before entering law school, shortly after earning an undergraduate degree in International Affairs and Political Science at GWU's Elliott School of International Affairs, Travis worked as a research intern for the Carnegie Endowment for International Peace. After that, he worked as a legal and data analytics intern at the Forensic Risk Alliance. During law school, Travis served as an Honors Intern at the Division of Enforcement of the Securities and Exchange Commission, and in the summer after his second year, he worked as an intern at the Antitrust Division of the U.S. Department of Justice. He was also the Online Editor of the George Washington International Law Review and published a note in the GW International Law Review on regulation of cross-border data transfers.

Since graduation, Travis has worked as an Honors Attorney and Attorney Advisor for the Wireless Competition Bureau of the Federal Communications Commission. Selected as one of five for the FCC's highly competitive entry level program, Travis has gained significant experience drafting regulations, reviewing regulatory comments, and writing legal memoranda concerning the intersection of administrative and communications law.

Travis is particularly proud of his writing skills, and the published note I mentioned above indicates that he has reason to be proud of his writing skills. I hope that you will afford Travis the opportunity to experience a clerkship in your chambers. I am sure that he will meet or exceed your expectations and that a judicial clerkship will be wonderful training for his desired career in government. Please let me know if you have any questions.

Very truly yours,

Robert L. Glicksman
J.B. & Maurice C. Shapiro Professor
of Environmental Law
(202) 994-4641
rglicksman@law.gwu.edu

WRITING SAMPLE

The attached writing sample is a memo describing what standard courts apply in determining whether the repositioning or expansion of a fringe competitor is sufficient to rebut a *prima facie* case that a merger will have anticompetitive effects. I wrote this memo in August 2020, while interning at the Department of Justice in the Antitrust Division, it was used as part of a preliminary investigation into claims that a merger of competitors in a concentrated market would lessen competition. The sample has been authorized for release, and in order to preserve the confidentiality of the merging parties, and to prevent the disclosure of any non-public information the memo omits any discussion of the specific facts of the investigation. The sample was edited in 2020 in response to light feedback received from my supervisors. In 2023 the sample was substantially edited to better showcase my current writing ability.

Subject	Legal standard for assessing the repositioning of fringe competitors in the context of §7 rebuttal argument	Date	July 13, 2020
To	[Redacted]	From	Travis Hahn Intern

I. Summary

This memo addresses the question of what standard courts use to assess whether the expansion or repositioning of existing fringe competitors[1] would sufficiently constrain any anticompetitive behaviors of the merging firms post-merger. This memo examines several cases brought by the DOJ and the FTC where the defendants attempted to use evidence of repositioning or expansion by fringe competitors as part of their attempt to rebut the DOJ or FTC's *prima facie* case that the merger would have anticompetitive effects. This memo concludes that courts consider a firm expanding or repositioning to represent effective entry to constrain the potentially anticompetitive behavior of the merging parties when (a) repositioning occurs within two to three years; (b) there is evidence of a history of successful repositioning in the market and evidence of low barriers to entry; and (c) the repositioned firm will be of a sufficient magnitude to compete with the merging firms.

II. Legal Issue

What standards do courts apply in analyzing whether the expansion or repositioning of a fringe competitor is sufficient to rebut the Government's *prima facie* case that a merger will have anticompetitive effects?

III. Introduction

Section 7 of the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly". 15 U.S.C. § 18. Courts assess Section 7 claims using a three-part burden-shifting framework: (1) the government must establish a *prima facie* case that the merger is anticompetitive; (2) if the government establishes a *prima facie case*, then the burden shifts to the defendant to rebut the Government's case; (3) if the defendant successfully rebuts, the burden of production shifts back to the Government along with the ultimate burden of persuasion. *See FTC v.*

[1] There is no established definition of 'fringe competitor'. For the purposes of this memo, a fringe competitor is a firm that has a minority market-share and is substantially small compared to the market leaders.

Penn State Hersey Med. Ctr., 838 F.3d 327, 337 (3d Cir. 2016) (citing *St. Alphonosus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015)).

To successfully rebut the government's *prima facie* case that a merger is anticompetitive, a defendant needs to prove that either: despite the *prima facie* case, that the merger will not have anticompetitive effects or that any anticompetitive effects of the merger will be offset by increases in efficiency. *Penn State Hersey Med. Ctr.*, 838 F.3d at 347. Many of the Courts of Appeal have recognized that entry of competitors can rebut a *prime facie* case of illegality. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 984, 987–989 (D.C. Cir. 1990) (holding that evidence of the potential or actual entry of competitors can rebut the Government's *prime facie* case); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 427 (5th Cir 2008); *FTC v. University Health Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *United States v. Waste Management, Inc.*, 743 F.2d 976, 982 (2d Cir. 1984); *Kaiser Aluminum Chem. Corp. v. FTC*, 652 F.2d 1324, 1341 (7th Cir. 1981). In economic terms, repositioning like entry and expansion has the potential to counteract the anticompetitive effects of the merger, and it is therefore assessed using the same standard. *See United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) (assessing repositioning of firms using timely, likely, sufficient test); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) §6.1 (noting that repositioning is evaluated "much like, entry").

Accordingly, defendants in Section 7 cases will often assert as part of their rebuttal case that the proposed merger will not have any anticompetitive effects because the expansion or repositioning of competitors will discipline the merged firm. *See, e.g.*, *H&R Block, Inc.*, 833 F. Supp. 2d at 73 (defendants arguing that fringe competitors' repositioning and expansion efforts will counteract any anticompetitive effects of the merger); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 214–215 (D.D.C. 2017) (defendants arguing that expansion of regional competitors will counteract the anticompetitive effects of the merger).[2]

This memo examines what legal standard courts use in assessing whether the expansion or repositioning of fringe competitors is sufficient to rebut the Government's *prima facie* case that a proposed merger is anticompetitive. It examines several Section 7 cases brought by the Department of Justice (DOJ), and the Federal Trade Commission (FTC) in federal court, where defendants raised the repositioning or expansion of fringe competitors at the rebuttal stage.

IV. Legal Standard

Courts generally utilize the 2010 DOJ-FTC Horizontal Merger Guidelines ("2010 Guidelines") in assessing whether the repositioning or expansion of smaller competitors will counter the anticompetitive effects of a merger. *See, e.g.*, *H&R Block, Inc.*, 833 F. Supp. 2d at 73 (applying merger guidelines to find repositioning or expansion of competitors not sufficient to counter the anticompetitive effects of the proposed merger); *Anthem, Inc.*, 236 F. Supp. 3d at 222–230 (applying merger guidelines to find expansion

[2] There is not an established definition of repositioning. For the purposes of this memo, repositioning is an effort by a firm to "move a product to a different place in the mind of the consumer". *See* University of Minnesota Libraries, *Principles of Marketing*, §5.4 (2020).

of regional competitors would not be sufficient to counter the anticompetitive effects of the proposed merger).

As entry, expansion, and repositioning have essentially the same economic effect on a merged firm, preventing it from exercising market power, courts generally apply the same criteria used in cases involving asserted entry-defenses.[3] *See Chi. Bridge & Iron Co.*, 534 F.3d at 429 (applying timely, likely, sufficient standard to potential entry of foreign firms into the liquified natural gas (LNG) storage container market); ***H&R Block, Inc.***, 833 F. Supp. 2d at 73–77 (applying timely, likely, sufficient standard to potential expansion or repositioning of tax-preparation software companies); *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) §6.1 ("repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency"). In assessing a reposition-defense, courts generally ask whether the repositioning of a firm would be timely, likely, and sufficient in its magnitude and character, and scope to deter or counteract the competitive effects of concern. *Chi. Bridge & Iron Co.*, 534 F.3d at 429 (applying guidelines); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 54 (D.D.C. 1998); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) §9.1.

A. Timely

According to the 2010 Guidelines, entry is timely if it occurs "rapid enough" to deter the anticompetitive effects of a merger, by making them unprofitable for the merged firm. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) §9.1. The 1997 Horizontal Merger Guidelines, state that only "committed entry alternatives that can be achieved within two years from initial planning to significant market impact" can be considered timely. U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (1997) §3.2.

Most courts in assessing entry defenses found entry to be timely when it occurs within two to three years of the merger. *See FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 67 (D.D.C. 2018) (finding that entry is timely when it occurs within two to three years); *FTC v. Staples*, 190 F. Supp. 3d 100, 134 (D.D.C. 2016) ("two to three years is the relevant temporal scope for the Court to consider the effects of new entrants or expansion of existing competitors"); *H&R Block*, 833 F. Supp. 2d at 73, n.27 ("For entry to be considered timely, it typically must occur within approximately two-years post-merger") (citing U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 45–47)).

However, in other cases involving unique industries with high barriers to entry, courts have used different timeframes in assessing whether entry is timely. *See FTC v. CCC Holdings Inc*., 605 F. Supp. 2d 26 (D.D.C. 2009) (finding entry of a potential competitor in the Estimatics Total-Loss-Value market to be untimely when there was no evidence that it would be able to compete effectively within five-years of the merger); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 233 (S.D.N.Y. 2020) (finding that DISH's entry into the retail mobile wireless telecommunications services market as a

[3] As entry, expansion, and repositioning are evaluated under the same legal standard the terms are used interchangeably in this memo.

result of a divestment mandate would be timely when it would "replace the competitive impact" of Sprint in the "long term").

B. Likely

The 2010 Guidelines suggest that entry is likely if it would be profitable for a firm taking into account the assets, capabilities, capital, and the risks involved in entry including the need for the firm to incur sunk costs. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) §9.2. The 2006 Commentary on the Horizontal Merger guidelines further suggest that entry is likely to occur when firms have an adequate profit incentivize to enter at the pre-merger market price. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 38.

In assessing whether entry is likely in a given market courts consider the existence of (1) barriers to entry, and (2) the history of expansion or entry in the market. *See e.g.*, *H&R Block, Inc.*, 833 F. Supp. 2d at 75; *Anthem, Inc.*, 236 F. Supp. 3d at 222. If the barriers to entry are substantial, such that entry will not be profitable courts will usually find that entry that would counteract the anticompetitive effects of the merger will not be likely to occur. *See Chi. Bridge & Iron Co.*, 534 F.3d at 437; *H&R Block, Inc.*, 833 F. Supp. 2d at 75. In other cases where expected returns justify investments, courts will find that a barrier to entry will not prevent entry. *See FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 42–48 (D.D.C. 2007), *rev'd on other grounds*, 533 F.3d 869 (D.C. Cir. 2008) (finding entry and repositioning to be likely where it would be profitable for firms, and where firms were responding to customer demand); U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 41 (describing cases where expected returns justified investments, and agencies declined to take action). Moreover, looking at the history of entry, courts generally find that evidence of successful entry indicates that future entry is likely. *See generally*, Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 39 (noting that successful entry is evidence that entry is likely following a merger).

1. Barriers to Entry

A barrier to entry is anything that permits a firm already in the market to earn supracompetitive profits while deterring competitors from expanding or repositioning. *See* Herbert Hovenkamp & Phillip E. Areeda, *Antitrust Law* ¶420 (4th ed. 2020). Courts generally find that entry is unlikely where there is evidence of significant barriers to entry. *See Baker Hughes*, 908 F.2d at 986 ("In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time"); *Chi. Bridge & Iron Co.*, 515 F.3d at 472–474; *Anthem, Inc.*, 236 F. Supp. 3d at 222. A barrier of entry is significant when it would prevent a firm from profitably entering a market at a pre-merger price point. *See Chi. Bridge & Iron Co.*, 515 F.3d at 472–474; *Rebel Oil co., v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) (holding that entry barriers are significant where they are "capable of constraining the normal

operation of the market to the extent that the problem is unlikely to be self-correcting."). Common barriers to entry include patents, control of essential resources, entrenched buyer preferences, high capital costs, and economies of scale. *See Rebel Oil*, 51 F.3d at 1439 (citing *United States v. Syufu Enterprises*, 903 F.2d 659, 663 (9th Cir. 1990)).

This subsection will discuss two of the most common barriers to entry: (a) reputation, and (b) economies of scale.

a. Reputation

The 2006 Commentary on the Horizontal Merger guidelines recognize that the reputation of firms can be a barrier to entry. U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* (2006) 41–44 (describing cases where reputation for quality, or consumer trust acted as a barrier to entry). Courts have also accepted that reputation can be a significant barrier to entry, such that entry would be unlikely. *See Chi. Bridge & Iron Co.*, 515 F.3d at 472–473 (finding reputation to be a significant barrier to entry in the LNG storage container market), *H&R Block, Inc.*, 833 F. Supp. 2d at 75–76 (finding reputation to be a significant barrier to entry in the digital do-it-your self-tax-preparation market). *But see United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 984 (2d Cir. 1984) (finding that reputation is not a barrier to entry but is instead the result of competition).

Reputation can be a significant barrier to entry in markets involving industrial or wholesale products where customers are concerned with firm reliability and reticent to use firms without a track-record of success. *See Chi. Bridge & Iron Co.*, 534 F.3d at 437; *CCC Holdings Inc.*, 605 F. Supp. 2d at 54–55; *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1076 (D. Del. 1991); *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* (2006) 40–41 (describing cases where reputation for reliability was a barrier to entry). Moreover, reputation can be a significant barrier to entry in markets involving sensitive or personal information. *See, e.g.*, *H&R Block, Inc.*, 833 F. Supp. 2d at 75 (finding reputation to be a significant barrier to entry in the digital do it yourself (DDIY) tax preparation market because consumers were wary of trusting their sensitive financial information to new entrants). Reputation can also be a significant barrier to entry in differentiated consumer product markets, where entrenched consumer preferences and high advertising costs make entry unprofitable and therefore unlikely. *See Id.* at 76 (finding reputation to be a significant barrier to entry in the DDIY tax preparation market because it would cost a new entrant millions of dollars in advertising to establish a brand preference); *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 38 (describing FTC challenge to proposed merger where entry was unlikely because of the "need to develop brand equity to compete effectively").

However, reputation is not always a significant barrier to entry, courts have found that the generalized reputation for a firm of providing quality goods or services is not usually a significant barrier to entry. *See Chi. Bridge & Iron Co.*, 534 F.3d at 437 ("generalized reputation alone is not an effective barrier to entry"); *United Tote, Inc.*, 768 F. Supp. at 1076 (noting that evidence that a customer is reluctant to consider a new entrant because of their lack of general reputation is an unreliable indicator of the incumbent's ability to exercise market power post-merger).

b. Economies of Scale

Economies of scale refer to the situation where a firm's production costs decrease as its output increases, so the more of a good or service it produces the lower its average cost. *See* Gregory Manikiw, *Principles of Microeconomics,* 272–273. The 2006 Commentary on the Horizontal Merger guidelines recognize that economies of scale or other cost-disadvantages can be significant barriers to entry by preventing would be entrants from recouping sunk costs at a pre-merger price-point. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 45. Courts assessing the likelihood of entry, have also recognized that economies of scale can be a significant barrier to entry, by making entry unprofitable for potential entrants. *See CCC Holdings Inc.,* 605 F. Supp. 2d at 82–83; *FTC v. Staples, Inc.,* 970 F.Supp. 1066, 1086 (D.D.C. 1997). Generally, Courts have found economies of scale to be significant barriers to entry in markets where there are network effects or high startup costs. *See CCC Holdings Inc.,* 605 F. Supp. 2d at 82–83. (finding economies of scale to be a barrier to entry where long term contracts (2-5 years), customer unwillingness to switch, and the fact that the industry is "saturated" or "mature" such that only about 10% of the market is available for expansion, would make it difficult for entrants to recoup sunk software development costs); U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 45 (discussing DOJ challenge to Waste Management-Allied Waste merger where entry was difficult as a result of economies of scale and network effects in the small container commercial waste industry).

2. Historical Evidence of Entry

Historical evidence of entry or expansion in the relevant market is a "central factor" in assessing whether or not expansion or entry is likely. *Anthem, Inc.*, 236 F. Supp. 3d at 222. Evidence of the successful entry or expansion of a firm in the relevant market, while not determinative, is indicative that entry is easy and therefore likely. U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizonal Merger Guidelines* (2006) 39 ("Successful prior entry can provide evidence that an anticompetitive merger would attract entry"), *but see United Tote, Inc.,* 768 F. Supp. at 1076 (finding expansion and repositioning unlikely where only one firm, the defendant, had succeeded in entering the market over a period of around 18 years, and the market went from four firms to three firms in a period of 3-years).

Historical evidence of firm's failing to expand or enter into the relevant market indicates that the barriers to entry are significant such that entry or expansion would be unlikely. *See Staples,* 970 F. Supp. at 1087 (finding expansion and repositioning unlikely where firms such as Kmart, Montgomery Ward, Ames, Zayres along with Office 1, the 4th largest office supply company in the U.S., had all attempted to enter or expand into the market over 11-years before the merger and had failed); *United Tote, Inc.*, 768 F. Supp. At 1076. Historical evidence of stable market shares or increasing concentration also indicates that a market has significant barriers to entry, and expansion or repositioning is unlikely. *See H&R Block, Inc.*, 833 F. Supp. 2d at 75 (finding repositioning unlikely where the market shares of the two closest fringe competitors

hadn't changed in over 20 years); *Cardinal Health, Inc.*, 12 F. Supp. 2d at 57 (finding repositioning unlikely given the history of consolidation from 155 to 45 firms in the relevant market over 20 years).

However, courts have also found entry to be likely despite historical evidence of failed entry or expansion when a market has gone through a structural change. *See Chi. Bridge & Iron Co.*, 534 F.3d at 429. A structural change is a significant change to the industry such that the barriers to entry no longer make entry unprofitable. *See Id.* at 428–429. Courts have generally found that a structural change has not occurred where the customer requirements, and sale mechanisms (e.g., request for proposal, competitive bidding etc.) have not changed. *See Id.* at 429 (finding that a structural change had not occurred where two small firms had been able to enter and the customers' requirements for a track record of expertise in constructing LNG tanks remained); *Staples, Inc.*, 190 F. Supp. 3d at 135 (finding that the market for B2B office supply contracts had not gone through a structural change where the market for office supply contracts still utilized the request for proposal framework); *United Tote, Inc.*, 768 F. Supp. at 1084 (finding that the market for large track totalisator (horse racing ticket buy/sell pooling system) had not gone through a structural change where 49 states still used multiple totalisator vendors who communicated using the standard protocols).

c. Sufficient

According to the 2010 Guidelines, entry is sufficient to deter or counteract the anticompetitive effects of a merger where either, a firm will "replicate at least the scale and strength of one of the merging firms", or in the case of the entry of multiple smaller firms where the firms are "not at a significant competitive disadvantage" U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) §9.3. The 2010 Guidelines further state, that entry will not be sufficient to counteract the anticompetitive effects of a merger where either the products offered by the entrant are not "close enough substitutes to the products offered by the merged firms" or if there are substantial constraints that "limit entrants' competitive effectiveness" such as reputational barriers to expansion or limitations on the ability of the best placed firms to enter the market." *Id.* In the 2006 Commentary on the 1997 Merger Guidelines, which utilize a similar standard, the DOJ and FTC note that in considering whether or not entry would be sufficient to counteract the anticompetitive effects of the merger that the agencies consider the barriers to entry in the relevant market. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Commentary on the Horizontal Merger Guidelines* 51 (2006).

Courts have followed the lead of the 2010 Guidelines and have generally held that entry is sufficient to counteract the anticompetitive effects of a merger when an entrant is of a sufficient scale such that it is able to compete effectively at the same level as the merged firm, filling the competitive void left by the merger. *See Chi. Bridge & Iron co.*, 534 F.3d at 430 (holding that entry is sufficient to counteract the anticompetitive effects of a merger where potential entrants would be of a "sufficient scale to compete on the same playing field"); *Anthem*, 236 F. Supp. 3d at 222 (citing *Sysco*, 113 F. Supp. 3d at 80) (holding that for entry to be sufficient to counteract the anticompetitive effects of the

merger it must "fill the competitive void that will result if the merger proceeds")(internal quotes omitted).

In determining whether a potential entrant is of a sufficient scale to fill the competitive void resulting from the proposed merger, courts look at whether the entrant will be an adequate substitute for one of the merging firms. *See Chi. Bridge & Iron co.*, 534 F.3d at 430; *Anthem, Inc.*, 236 F. Supp. 3d at 214–215. In assessing whether an entrant will be an adequate substitute, courts look at (1) the views of customers and the merging parties; (2) the entrants' capacities and offerings, and (3) the commercial success of the entrants. *See Chi. Bridge & Iron co.*, 534 F.3d at 430; *Anthem, Inc.*, 236 F. Supp. 3d. at 214–215; *FTC v. Staples, Inc.*, 190 F. Supp. 3d at 134; *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 381 (S.D.N.Y. 2001).

First, if the consumers in the relevant marketplace don't view the entrants as replacing the competition lost by the merger, then the entrants are likely not of a sufficient scale to compete effectively with the merged firm. *See Chi. Bridge & Iron co.*, 534 F.3d at 430 (finding foreign firms in the LNG storage container market to not be of a sufficient scale to compete on the same level as the merging parties where they were viewed by consumers as not "adequately replacing" the competition lost in the merger). Also, in cases where customers don't view the offerings of the entrant and the merged firms to be close substitutes, courts will often find that the entrant is not of a sufficient scale to be able to effectively compete with the merged firms. *See Staples, Inc.*, 190 F. Supp. 3d at 134 (finding Amazon Business not to be of a sufficient scale to compete on the same level as the merging parties, where customers in the B2B Office supply market did not view it as a substitute for the merging parties); *Anthem, Inc.*, 236 F. Supp. 3d 171, at 225–227. In other cases, courts will find that potential entrants would not be of a sufficient scale to be able to effectively compete with the merged parties, where the merged parties did not view the entrants as competitive threats. *See, e.g., Visa U.S.A., Inc.*, 163 F. Supp. 2d at 381 (finding entry by non-traditional companies in the card-network market not to be of a sufficient scale to compete on the same level as the merging parties where the merging parties did not view the potential entrants as competitive threats).

Additionally, in cases where there is a mismatch between the capacities of the potential entrants and the merging parties, courts have generally found the entrant not to be of a sufficient scale to be able to effectively compete with the merged firm. *See Anthem, Inc.*, 236 F. Supp. 3d. at 214–215 (finding alternatives to national insurance carriers to not be of a sufficient scale to compete with the merging parties where in contrast to the merging parties, they lack the capacity to offer a "unified plan" to "larger, more geographically dispersed employers"); *Staples, Inc.*, 190 F. Supp. 3d at 134 (finding Amazon Business to not be of a sufficient scale to compete with the merging parties where, in contrast to the merging parties, it lacked key features including a track record of winning large enterprise customer's business under a request for proposal model, customer-specific pricing, and desktop delivery of office supplies); *FTC v. Cardinal Health*, 12 F. Supp. 2d at 58 (finding that local and regional pharmaceutical companies would not be of a sufficient scale to compete with the merging parties because they

would be unable to serve the primary and secondary wholesale needs of national consumers).

Moreover, in cases where the commercial success of the entrant is not close to that of the merging parties, courts have generally found the entrant not to be of a sufficient scale to effectively compete with the merging parties. *See Anthem, Inc.*, 236 F. Supp. 3d at 214–215; *Staples, Inc.*, 190 F. Supp. 3d at 113, 133–34. In assessing the level of a firm's commercial success, courts examine the market share, customer base, revenue and growth history of a firm. *See Anthem, Inc.*, 236 F. Supp. 3d. at 214–215 (finding that alternatives to national insurance carriers were not of a sufficient scale to compete with the merged parties where evidence established "the mere existence, and not the growing market significance of any of the alternatives"); *United States v. Bazaarvoice, Inc.*, 2014 WL 203966, at *40–46 (N.D. Cal. Jan. 8, 2014) (finding competitors not to be of a sufficient scale to compete with the merged parties where they had substantially lower market-shares and revenues compared to the merging parties); *Staples, Inc.*, 190 F. Supp. 3d at 113, 133–34 (finding W&B Mason to not be of a sufficient scale to compete effectively with the merging parties, where it had a yearly revenue of $1.4billion, and no customers in the Fortune 100, compared to combined revenues over $37billion, and a combined Fortune 100 market share of 80% for the merging parties), *H&R Block*, 833 F. Supp. 2d at 75–77 (finding that expansion of a tax-preparation firm would not be of a sufficient scale to compete effectively with the merging parties, where it had a market-share of less than 3%, that had not changed within the last five-years).

V. Conclusion

Courts very rarely find fringe competitors' repositioning efforts to be sufficient. Evidence that a firm will reposition following a merger must prove that such repositioning will be timely, likely, and sufficient to rebut the government's *prima facie* case that the merger will increase market power. All three of these hurdles are difficult bars to clear, and courts have therefore rarely found for defendants who have relied on entry to rebut a presumption that the merger would result in increased market power.

WRITING SAMPLE

The writing sample is an excerpt of a Federal Communications Commission Order adopting rules implementing the Affordable Connectivity Program (ACP) Transparency Data Collection, that was adopted by the Commission and published in November 2022. For background, the Affordable Connectivity Program is a $14.2 billion affordable broadband benefit program wherein low-income households can receive a credit of an amount up to $30/month off the cost of broadband internet access (additional information on the ACP is available at getInternet.gov and Affordbleconnectivity.gov). The ACP Transparency Data Collection is a congressionally mandated annual collection of information relating to the price and subscription rates of the Internet service offerings subscribed to by ACP households. Also, I would like to note that the FCC uses a citation style that differs slightly from the Bluebook namely we don't use en dashes for multiple-page pin cites, and we refer to "Comments" when the comments are part of the docket of the current proceeding. I was the Attorney who primarily wrote these excerpted sections and co-workers and supervisors made limited edits.

I. INTRODUCTION

1. In this Fourth Report and Order (Order), the Federal Communications Commission (Commission) establishes the Affordable Connectivity Program (or ACP) Transparency Data Collection, which will collect information related to the price, subscription rates, and plan[1] characteristics of the internet service offerings of Affordable Connectivity Program participating providers as required by the Infrastructure Investment and Jobs Act (Infrastructure Act).[2] This Order fulfills the Congressional mandate to issue final ACP Transparency Data Collection rules regarding the annual collection of information related to the price and subscription rates of internet service offerings of ACP providers to which an ACP household subscribes, no later than one year after the enactment of the Infrastructure Act.[3] In the accompanying Further Notice of Proposed Rulemaking (Further Notice), we also seek comment on the statutory requirement to revise the ACP Transparency Data Collection rules we adopt to verify the accuracy of the data submitted pursuant to this collection, and on collecting additional information, including subscriber-level data and data on subscriber interactions with provider representatives.[4]

2. The ACP Transparency Data Collection that we establish today will offer the Commission an opportunity to collect detailed data about the services to which households in the Affordable Connectivity Program chose to apply the affordable connectivity benefit. The ACP Transparency Data Collection will further leverage information required for the broadband consumer labels, helping to create efficiencies and minimize burdens on providers. The actions we take today in response to Congress's directive will allow the Commission to determine the value being provided by the affordable connectivity benefit to households, and to evaluate our progress towards the program goal of reducing the digital divide, while also balancing the privacy interests of consumers and minimizing burdens on the ACP participating providers that serve the nearly 15 million households enrolled in the Affordable Connectivity Program.

II. BACKGROUND

3. On November 15, 2021, the President signed the Infrastructure Act, which appropriated $14.2 billion for the Affordable Connectivity Program, a new longer-term broadband affordability program, expanding and modifying the Emergency Broadband Benefit (EBB) Program.[5] The Affordable Connectivity Program plays an integral role in making available affordable broadband services by providing qualifying low-income households with a monthly discount of up to $30 per month (or up to $75 per month for households on qualifying Tribal lands) for broadband services, and a one-time $100 discount on a connected device (tablet, laptop, or desktop computer) from the participating provider with a co-pay of more than $10 but less than $50.[6]

[1] A "plan" referred to in this Order has the same meaning as an "internet service offering" as defined in 47 CFR § 54.1800(n).

[2] Infrastructure Investment and Jobs Act, div. F, tit. V, § 60502(c) (Infrastructure Act). The statute as modified by the Infrastructure Act is codified at 47 U.S.C. § 1752, *Benefit for broadband service*.

[3] *Id.*

[4] *Id.* § 60502(c)(2).

[5] *Id.* § 60502. The EBB Program was a $3.2 billion program established pursuant to the Consolidated Appropriations Act of 2021 to provide discounted broadband service to low-income households, including those experiencing economic disruption related to the Covid-19 pandemic. *See Affordable Connectivity Program*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 21-450 and 20-445, FCC 22-2, at 3, para. 3 (Jan. 21, 2022) (*ACP Order* or *ACP Further Notice*). The EBB Program launched on May 12, 2021. *ACP Order* at 3, para. 3. Consistent with the requirements of the Infrastructure Act, the EBB Program ended and the Affordable Connectivity Program started on December 31, 2021. *ACP Order* at 4, para. 6.

[6] 47 CFR § 54.1803(a)-(b).

4. The Infrastructure Act also directs the Commission to establish an annual mandatory collection "of data relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program . . . to which an eligible household subscribes."[7] Congress further directs the Commission to revise the rules of the collection to verify the accuracy of the data submitted no later than 180 days after the final rules are issued, and to make data from the annual collection publicly available in a commonly used electronic format while also protecting personally identifiable information (PII) and proprietary information.[8] In furtherance of these requirements, on June 8, 2022, the Commission adopted a Notice of Proposed Rulemaking seeking comment on the ACP Transparency Data Collection.[9]

5. The Infrastructure Act also directs the Commission to undertake a rulemaking to implement additional transparency measures which intersect with the ACP Transparency Data Collection.[10] Specifically, the Infrastructure Act requires the Commission to "rely on the price information displayed on the broadband consumer label . . . for any collection of data . . . under section 60502(c) [the ACP Transparency Data Collection]."[11] On November 14, 2022, we adopted rules for a consumer broadband label that will display clear information about broadband services to enable consumers to comparison-shop for those services.[12]

III. DISCUSSION

6. *Unique Identifier and Broadband Labels.* The Infrastructure Act requires the Commission to "rely on the price information displayed on the broadband consumer label . . . for any collection of data . . . under section 60502(c)."[13] In the *ACP Data Collection Notice*, we sought comment on the interplay between the broadband labels and the ACP Transparency Data Collection, including how to interpret the Infrastructure Act's requirement that we rely on the price information contained in the labels.[14] The broadband labels include a service plan's name, speed, and a unique identifier associated with that plan, along with information relating to monthly price, additional fees (one-time and monthly), and plan characteristics (upload and download speeds, latency, and data caps).[15] Commenters overwhelmingly agree that we should rely on the upcoming broadband labels to collect plan price and characteristic information in order to reduce the burden that this collection places on providers.[16] We find here that leveraging broadband labels for purposes of the ACP Transparency Data Collection not only fulfills the statutory requirement, but also makes the ACP data collection more efficient and minimizes

[7] Infrastructure Act, div. F, tit. V, § 60502(c).

[8] *Id.*

[9] *Affordable Connectivity Program*, WC Docket No. 21-450, Notice of Proposed Rulemaking, FCC-22-44 (June 8, 2022) (*ACP Data Collection Notice)*.

[10] *See Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Notice of Proposed Rulemaking, FCC 22-7 (Jan. 27, 2022) (*Broadband Labels Notice*).

[11] *Id.* at 7, para. 25 (citing Infrastructure Act, div. F. tit. V, § 60504(b)(2)).

[12] *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-86 (adopted Nov. 14, 2022) (*Broadband Labels Order*).

[13] Infrastructure Act, div. F. tit. V, § 60504(b)(2).

[14] *ACP Data Collection Notice* at 5, para. 10.

[15] *Broadband Labels Order* at 6 (sample broadband label).

[16] CCA Reply at 6 (suggesting that the Commission "leverage price information from the broadband labels" (quoting NCTA Comments at 20)); JSI Comments at 5-6 (suggesting that the Commission can use the label information to collect statutory required information while "minimizing the burden on small providers"); Starry Reply at 5 (encouraging the Commission to "utilize the price and subscription information that will be provided on the forthcoming broadband labels where possible"); WISPA Reply at 3 ("agree[ing] with commenters that encourage pricing information to rely on information provided on the Broadband Label").

the burden on providers by allowing them to cross-reference the information displayed on a broadband label.

7. To allow us to best utilize the information contained in the broadband labels and to collect the data associated with each ACP-supported plan, we require providers to submit a unique identifier for each service plan to which an ACP household applies the affordable connectivity benefit. As we recognize in the *Broadband Labels Order*, the use of a unique identifier is a means of collecting plan data while minimizing the burden on providers.[17] Providers must submit as part of the annual collection of plan information a unique identifier that matches the plan's corresponding broadband label,[18] where a broadband label exists. Where a broadband label does not exist (*e.g.*, grandfathered or legacy plans) or where a broadband label does not uniquely identify the plan to which an ACP household applies the benefit (*e.g.*, bundled service plans), providers are also required to create and submit a unique identifier for any plan to which an ACP household subscribes. In such a case, the provider should use the same format as for plans that are covered by a broadband label. Consistent with the *Broadband Labels Order*, providers will not be permitted to reuse unique identifiers.[19] We direct the Wireline Competition Bureau (Bureau or WCB) with support from the Office of Economics and Analytics (OEA) to develop guidance concerning when a provider is required to formulate a new unique identifier.

8. *Optional reporting of all-in price information.* Considering the record, we also find that it would be effective to collect the all-in price—that is, the actual price that would be paid by the ACP household, absent the application of the affordable connectivity benefit.[20] This price would include the price of any associated equipment, taxes, and fees as well as any non-ACP discounts or promotions offered to the customer.[21] With respect to bundled service offerings, the all-in price should be the entire price of the bundled service, as this will allow us to get a view of the actual expenses paid by ACP households. We find that collecting the all-in price will help the Commission determine a household's actual broadband expenses, absent the ACP benefit. We agree with the City of Seattle that collecting all-in price will help the Commission determine our progress towards reducing the digital divide as cost is "one of the primary barriers to broadband adoption" and collecting all-in price will better inform the Commission and local stakeholders about the pricing of ACP plans.[22]

9. Additionally, collecting the all-in price with the affordable connectivity benefit applied (net-rate charged) will help the Commission determine the efficacy of the Affordable Connectivity Program. In the *ACP Data Collection Notice*, we sought comment on whether there were "any other indicators of price that should be collected."[23] The Competitive Carriers Association (CCA), CTIA,

[17] *Broadband Labels Order* at 28, paras. 79-80 (recognizing the utility of unique plan identifiers, and lack of evidence suggesting a high burden on providers).

[18] *See id.* at 27-28, para. 78 (describing unique plan identifier requirement).

[19] *See id.* at 27-28, para. 78.

[20] ACA Connects Comments at 7 (supporting collection of "the amount that a household would pay absent the ACP subsidy"); Common Sense Comments at 5 (arguing that the price data collected "should reflect the actual cost" of a service plan); NaLA Comments at 3 (supporting collecting "the monthly charge for the internet service offering that a household would be charged if it did not receive the ACP benefit"); City of New York Comments at 2 ("The City recommends that price and subscription rate information includes . . . the actual price paid by the enrollee."); City of Seattle Comments at 4 ("The Commission should collect pricing information that includes the actual cost paid by broadband subscribers, with and without the benefit.").

[21] The actual price of the plan absent the affordable connectivity benefit includes the rate of the plan and the application of all provider-offered discounts and promotions, and the Lifeline discount, if applicable.

[22] City of Seattle Comments at 3-4; *see also* Common Sense Comments at 5 (arguing that collecting the actual cost of service plans is important to understanding the "real prices" paid by households, and the impact of introductory and promotional rates).

[23] *ACP Transparency Data Collection Notice* at 3, para. 5.

NCTA--The Internet & Television Association (NCTA), and USTelecom (collectively, the Associations) suggest that we optionally permit providers to submit the "net-rate charged" as part of this collection, which they define as the "recurring monthly price charged to ACP households . . . for ACP-supported services after application of any state or federal low-income benefits or any applicable promotions or discounts."[24] They argue that collecting the net-rate charged would allow the Commission to determine the average out-of-pocket costs for ACP households. We find that information concerning ACP subscribers' out-of-pocket expenses is valuable to the Commission and will assist us in determining the efficacy of the ACP benefit in reducing the digital divide, and adopt the Associations' proposal in part.[25] Additionally, providers can optionally submit as part of this collection, the total number of subscribers paying $0 and the average "all-in" price for subscribers whose monthly bill is greater than $0, after all discounts and benefits, including the ACP benefit and Lifeline (where applicable), have been applied. By limiting the collection of net-rate charged to subscribers with out-of-pocket expenses after the application of the affordable connectivity benefit, we will ensure that the Commission collects data that most accurately reflects the average out-of-pocket expenses paid by ACP subscribers.[26]

10. We acknowledge comments suggesting that collecting "granular price information" including all-in price would be burdensome and would present administrative or technical challenges.[27] Given the mixed support for reporting such information, for purposes of this collection, providers will not be required to submit all-in price or the net-rate charged, and all-in price and net-rate charged will instead be optional fields that providers can choose to submit.

11. *Plan Characteristics.* In addition to collecting subscription rates for each plan by provider aggregated at the ZIP code level, we also direct providers to submit service plan characteristics to fulfill our requirements under the Infrastructure Act to collect "data relating to price and subscription rate information."[28] In the *ACP Order*, we recognized that collecting service plan characteristics could help us determine the value of the Affordable Connectivity Program to households and directed the staff to determine the appropriate plan characteristics for the collection.[29] In the *ACP Data Collection Notice*, we proposed using the ACP Transparency Data Collection to collect certain characteristics of ACP

[24] *See* Letter from Angela Simpson, Competitive Carriers Ass'n, Amy Bender, CTIA, Steve Morris, NCTA-The Internet & Television Ass'n, & Diana Eisner, USTelecom-The Broadband Ass'n to Marlene H. Dortch, Secretary, FCC; WC Docket No. 21-450, at 2 (filed Nov. 8, 2022) (Associations Nov. 8 *Ex Parte*) (supporting collection of the net-rate charged: the "recurring monthly price charged to ACP households after application of any state or federal low income benefits or any applicable promotions or discounts").

[25] The Associations proposed that we collect the average net-rate charged for all ACP households. *See* Associations Nov. 8 *Ex Parte* at 1-2. We are limiting our optional collection of average net-rate charged to ACP households whose net-rate charged would be greater than $0 a month, because we find that limiting the collection to subscribers with out-of-pocket expenses will result in a more accurate data set detailing such expenses and would not be skewed by subscribers with fully subsidized plans. *See infra* note 95 (describing data set skew involving subscribers with $0 a month net-rate charged). We are separately collecting information on the number of subscribers who are paying $0 a month after the application of all discounts and benefits and the ACP benefit.

[26] For example, under the Associations' proposal if there were 10 subscribers in a given ZIP code, paying $0 per month, and 5 paying $25, the net-rate charged would be $1.67 across 15 subscribers. Under our adopted methodology, the average net-rate charged would be $25 and providers who chose to would submit a total of 10 subscribers paying $0.

[27] NaLA Comments at 3-4 (arguing against collection of taxes and fees); NCTA Comments at 22 (arguing that collecting tax and fees would impose a burden on providers); USTelecom Comments at 2 (arguing that collecting information on promotional rates or discounts would be burdensome and would distort the data set); Associations Nov. 8 *Ex Parte* at 2 (arguing that collection of net-rate charged should be optional).

[28] Infrastructure Act, div. F, tit. V, § 60502(c)(1); *infra* para. 13.

[29] *ACP Order* at 50-51, para. 100.

service plans.[30] Collecting these data will help us to understand the preferences of the ACP households, and to determine the value of the Affordable Connectivity Program, consistent with our direction in the *ACP Order*.[31] This part of the collection is also consistent with the requirement in the Infrastructure Act to collect "data *relating* to price and subscription rate information."[32] Specifically, in addition to the pricing information on the broadband label we also require providers to submit the additional plan information found on a broadband label.[33] We will also collect information not included on the broadband label; specifically, maximum advertised speeds, bundle characteristics, and associated equipment requirements for each plan with an enrolled ACP subscriber. Providers will be required to submit this information for all plans with ACP subscribers; however, some of the fields on a broadband label may not be applicable to legacy plans and will be optional.[34]

12. We disagree with the commenters who suggest that the Commission is not authorized to collect service plan characteristic information as part of this collection because plan characteristics are "outside the scope" of the Infrastructure Act.[35] We find that plan characteristics are contemplated by the provision of the Infrastructure Act compelling us to collect "data relating to price and subscription rate information."[36] The price of broadband service is determined in part by plan characteristics, including but not limited to upload and download speeds and data caps.[37] In fact, the Commission has found a positive relationship between download speeds and price in the fixed broadband market, and between data caps and price in the pre-paid wireless market.[38] Moreover, the collection of plan characteristic information, including associated equipment requirements, plan latency, and bundle characteristics, is necessary because such information will allow us to contextualize service plan price information and determine the

[30] *ACP Data Collection Notice* at 4, para. 8. We also stated that the redundancy avoidance provision of the Infrastructure Act contemplates that the Commission might engage in other data collection activities and asked how this provision would affect the collection of plan characteristic data and on the use of the ACP Transparency Data Collection to collect such information. *Id.* The redundancy avoidance provision provides that nothing "shall be construed to require the Commission . . . to duplicate an activity that the Commission is undertaking as of the date of enactment" of the Act "if the Commission refers to the activity in the" final ACP Transparency Data Collection, and if "the Commission discloses the collection activity to the public." Infrastructure Act, div. F, tit. V, § 60502(c)(3).

[31] *See ACP Order* at 50-51, para. 100 (directing WCB to collect plan characteristic information).

[32] Infrastructure Act, div. F, tit. V, § 60502(c)(1) (emphasis added); *infra* para. 13.

[33] The broadband labels will include the name and speed tier of a plan, a unique plan identifier, the monthly base price of a plan, any discounts associated with annual contracts, or promotional rates, itemized recurring and one-time fees, the data cap, and the associated charge, the typical upload and download speed, the typical latency information, whether the provider participates in the Affordable Connectivity Program, and a link to the provider's network management and privacy policies. *See Broadband Labels Order* at 6.

[34] *See, e.g., infra* para. 18 (discussing latency).

[35] NCTA Comments at 7 (arguing that the Commission cannot collect bundle characteristics because the collection is "limited to broadband transparency, and should not be extended to voice or video service components"); CTIA Reply at 9 (arguing that the Commission is not permitted to collect plan characteristics because "Congress has specified the scope of this data collection"); NTCA Reply at 5 (arguing that text of the Infrastructure Act indicates that "Congress specifically sought a very limited collection . . . that restricted the burden on providers to the furthest extent possible").

[36] Infrastructure Act, div. F, tit. V, § 60502(c)(1).

[37] Competition Marketplace Report 2020, 76, paras. 109-11 ("pricing for fixed services depends on several factors, including speed tier, technology, region of service, contract length, and an array of bundling options"), *available at* https://docs.fcc.gov/public/attachments/FCC-20-188A1.pdf; *see* Wireless Competition Report 2017, 75-76 (displaying positive relationship between price and data-caps in prepaid wireless plans).

[38] *Id.*

value being provided to eligible households by the Affordable Connectivity Program.[39]

13. T-Mobile and Altice contend that the Infrastructure Act's direction to rely on the information contained in the broadband labels prevents us from collecting any price or plan characteristic information not contained in the labels, including data cap and bundle characteristic information.[40] We decline to adopt this interpretation. The relevant provision of the Infrastructure Act provides that the Commission "shall rely on the price information displayed on the broadband consumer label under subsection (a) for any collection of data relating to the price and subscription rates of each covered broadband internet access service under section 60502(c) [the ACP Transparency Data Collection]."[41] The language of the statute notes that the Commission shall rely on the pricing information on the broadband label but does not state that the Commission is limited to the information displayed on the label. We view this provision of the Infrastructure Act as working alongside the redundancy avoidance provision under section 60502(c)(3)[42] to avoid imposing duplicative collection requirements on providers, and as an instruction to utilize the price information in the labels where feasible.

14. *Speed.* In the *ACP Data Collection Notice*, we proposed collecting speed information as one metric of plan characteristics covered by the ACP Transparency Data Collection.[43] As speed is one of the information fields contained on the upcoming broadband labels, we require providers to submit data related to the speed of the services to which ACP households subscribe, in line with the Infrastructure Act's direction to "rely" on the broadband labels.[44] Such speed data will include the actual (*i.e.*, typical) download and upload speed and typical latency data that providers will be required to include on the broadband labels, in addition to advertised speed.[45]

15. Commenters generally support the collection of service plan speed.[46] Commenters recognize the importance of broadband speed, describing it as among the "key characteristics" utilized by consumers in distinguishing between plans, and suggesting that the collection of speed information could allow the Commission to get a "more accurate depiction of the service experience" of ACP subscribers.[47] Moreover, collecting speed information is crucial for the Commission to understand the value being

[39] *ACP Order* at 50-51, para. 100.

[40] Altice Comments at 2-3 (arguing that the FCC should only collect price information contained in the broadband labels); T-Mobile Comments at 3-4 (arguing that "Congress left the Commission no discretion to collect additional price information from providers").

[41] Infrastructure Act, div. F, tit. V, § 60504(b)(2).

[42] The redundancy avoidance provision of the ACP Transparency Data Collection section of the Infrastructure Act provides that "[n]othing in this subsection shall be construed to require the Commission, in order to meet a requirement of this subsection, to duplicate an activity that the Commission is undertaking as of the date of the enactment of this Act [Nov. 15, 2021]." *Id.* § 60502(c)(3).

[43] *ACP Data Collection Notice* at 5, para. 9.

[44] *Broadband Labels Order* at 6; Infrastructure Act, div. F, tit. V § 60504(b)(2).

[45] *Broadband Labels Order* at 13-15, paras. 37-40.

[46] ACA Connects Comments at 6 (supporting collection of upload and download speed); City of New York Comments at 2-3 (supporting collection of "actual not-marketed" upload and download speeds); Lumen Reply at 2 (supporting "reporting the advertised broadband speeds associated with its current service offerings"); City of Seattle Comments at 4 (supporting collection of "upload and download speeds"); Starry Reply at 3 (supporting collection of advertised speed information); USTelecom Comments at 3 (supporting collection of upload and download speeds); WISPA Comments at 4 (suggesting that the Commission limit collection of plan characteristics to "advertised upload and download speed").

[47] ACA Connects Comments at 8; City of Seattle Comments at 5.

provided by the affordable connectivity benefit, because the speed of a broadband service plan influences what internet applications a household can use.[48]

16. Some commenters suggest that collecting both the advertised and actual speed of ACP service plans will allow the Commission to compare the speeds and get an accurate view of the "service experience" of ACP subscribers.[49] Joint commenters Public Knowledge and Common Sense and the City of Seattle argue that by collecting both advertised and actual speed, the Commission will be able to ensure that subscribers are obtaining value from their benefit and are able to use the federal subsidy to receive their intended service.[50] We acknowledge that some commenters argue that collecting speed information or requiring both advertised and actual speeds would be burdensome to providers, but we find that the benefits of collecting such information outweigh any burdens.[51] We find that the requirement to submit the actual speed of a service plan is not overly burdensome, as providers will be required to produce this information as part of their broadband labels.[52] Furthermore, providers should be accustomed to producing advertised speed information because providers are already required to submit advertised speed as part of the Form 477 collection and provide such information to potential subscribers on their public facing websites in the ordinary course of business.[53] As noted above, the collection of advertised speed is also consistent with the requirement in the Infrastructure Act to collect "data *relating* to price and subscription rate information."[54] Therefore, providers will be required to submit the actual and advertised

[48] For instance, the Commission has found that a household needs a service plan with a minimum of 5-25 Mbps to be able to telework, and a minimum speed of 6 Mbps to use video conferencing services. FCC, *Broadband Speed Guide*, https://www.fcc.gov/consumers/guides/broadband-speed-guide (last visited Oct. 25, 2022) (describing minimum broadband speeds for various internet applications and uses).

[49] Common Sense Comments at 7 (suggesting that the Commission collect and compare advertised and actual speed); City of Seattle Comments at 5 (suggesting that the Commission collect and compare advertised and actual speed to get a better view of the user experience, including requiring providers to engage in "technical checks"). A number of commenters also supported the collection of actual or advertised speed. *See* Lumen Reply at 2 (supporting collection of "advertised speeds associated with its current service offerings"); Starry Comments Reply at 3 (supporting collecting advertised speeds); WISPA Comments at 4 (supporting collection of advertised upload and download speeds); City of New York Comments at 2-3 (supporting collection of 'actual, not marketed" upload and download speeds).

[50] Common Sense Comments at 7 (arguing that collecting advertised and actual speed will allow the Commission to compare speed and "ensure that public money obtains the intended services"); City of Seattle Comments at 5 (noting subscriber experience with having "unexpectedly low speeds").

[51] Starry Reply at 3 (arguing that advertised speed collection will "help to ease administrative burdens" on participating providers); T-Mobile Comments at 2 (suggesting that collection of speed data would "create additional burdens" on providers); WISPA Comments at 2, 8 (arguing for collection of advertised speed information to avoid "placing overly burdensome collection requirements on providers").

[52] *Broadband Labels Order* at 13-16, paras. 37-42 (describing actual speed submission requirement). Providers also often provide typical speed information to prospective customers on public-facing websites. *See, e.g.*, Verizon, *Fios & DSL Network Performance*, https://www.verizon.com/about/our-company/network-performance (last visited Oct. 21, 2022) (describing December 2021 speed testing for various speed tiers). We understand providers' concern with being required to engage in subscriber-level technical checks and, given the administrative and technical burdens associated, we do not adopt any requirement that providers test the actual network performance. CTIA Reply at 12 (arguing that testing actual network performance at the subscriber level "would impose considerable burdens on participating providers").

[53] FCC, *Explanation of Broadband Deployment Data*, https://www.fcc.gov/general/explanation-broadband-deplofment-data (last visited Oct. 21, 2022) (describing Form 477 data fields); *see, e.g.*, Optimum, *Optimum Fiber Network with up to 1 Gig Internet and Smart Wifi*¸ https://Optimum.com/internet/fiber (last visited Oct. 25, 2022) (describing fiber internet with speeds "up to" 940 Mbps"); T-Mobile, *What is 5G? 4G LTE vs 5G, Speed & More*, https://www.t-mobile.com/5g (last visited Oct. 25, 2022) (describing 5G network having "superior speeds up to 20 Gbps").

[54] Infrastructure Act, div. F, tit. V, § 60502(c)(1) (emphasis added); *supra* para. 13.

speeds of ACP service plans as part of this collection.[55]

17. Consistent with the Broadband Data Collection definition of advertised speed, we use the maximum advertised upload and download speed for fixed providers, and the minimum advertised upload and download speeds for mobile providers.[56] For actual speed, we use the definition adopted in the *Broadband Labels Order*: the typical upload and download speeds for a particular speed tier.[57] For fixed broadband plans, we direct providers to utilize the Measuring Broadband America (MBA) methodology or other relevant testing data.[58] For mobile broadband plans, we require providers to submit the applicable technology type (*e.g.*, 4G, 5G), and direct providers to use the methodology adopted in the *Broadband Labels Order*: reliable information on network performance that is the result of their own third-party testing.[59]

18. To ensure comprehensive data with respect to ACP-supported plans, we require providers to submit latency data consistent with the requirements in the *Broadband Labels Order*.[60] Commenters argue that collecting latency data is overly burdensome and suggest that latency is not one of the "key characteristics" utilized by consumers in distinguishing between plans.[61] We find that while there is merit to this argument with respect to grandfathered or legacy plans, which are neither marketed nor available to new consumers, the inclusion of latency on broadband labels warrants the inclusion of these data in the ACP Transparency Data Collection for currently marketed plans. We clarify that such information will not be required for legacy or grandfathered plans, although such information may be voluntarily submitted by providers.

19. *Data Caps and Connection Reliability.* In the *ACP Data Collection Notice*, we sought comment on whether to collect information on data caps for ACP-supported services, including the amount of the data cap and the number of ACP households that reached the cap.[62] We agree with commenters that information concerning data caps is critical to allowing consumers and the Commission to determine the value provided by a service plan.[63] For example, ACA Connects, in supporting the collection of data cap information, characterizes data caps as among the "key characteristics" that

[55] Actual speed will be an optional data field for legacy and grandfathered plans.

[56] FCC, *Broadband Data Collection: Data Specifications for Biannual Submission of Subscription, Availability, and Supporting Data*, https://us-fcc.app.box.com/v/bdc-availability-spec, 24-25, 49-50 (last visited Oct. 25, 2022) (describing BDC data fields).

[57] *Broadband Labels Order* at 13-15, paras. 37-38.

[58] Providers can also submit actual speed information based on internal testing, consumer speed test data, or other data regarding network performance, including reliable, relevant data from third party sources. *Id.* at 15, paras. 39-40; *see also 2017 Restoring Internet Freedom Order*, 33 FCC Rcd at 441 n.818 (citing *2011 Advisory Guidance*, 26 FCC Rcd at 9414-15).

[59] Providers that don't have reasonable access to network performance data are also permitted to disclose a Typical Speed range (TSR). *Broadband Labels Order* at 13-16, paras. 37, 40-42.

[60] *Id.* at 15, paras. 39-40.

[61] ACA Connects Comments at 9 (arguing that latency and packet loss are not relevant to consumers, and are not part of provider advertising efforts); NTCA Comments at 6 (arguing that packet-loss is a "feature and not a bug" and should not be collected); USTelecom Reply at 3 (arguing that the Commission should not collect plan latency because it would require the collection of additional information from subscribers).

[62] *ACP Data Collection Notice* at 5, para. 9. In the *ACP Data Collection Notice*, we defined data caps to mean data usage restrictions on both pre-paid and post-paid plans. *Id.* at n.23.

[63] ACA Connects Comments at 6; City of Seattle Comments at 2. *See also* Altice Comments at 3 (supporting collection of data caps at aggregate level); City of New York Comments at 2-3 (supporting collection of data caps); Common Sense Comments at 5 (suggesting that the Commission collect information on data caps, including the cost of additional data); USTelecom Comments at 3 (supporting submission of "existence of data cap" as a field in an aggregate collection).

subscribers rely upon when choosing between service plans.[64] The City of Seattle also characterized data caps as among "the most important data to collect on service plan characteristics."[65] WISPA argued that the Commission should not collect data cap information, given the burden such a collection would impose on small providers.[66] Like service plan speed, data caps inherently limit the use of a subscriber's broadband connection. A low monthly data cap can prevent subscribers from using applications requiring high bandwidth, including, for example, video streaming and remote education applications.[67] We disagree with WISPA that the collection of data cap information will be overly burdensome to small providers. Providers will already be required to display data cap information under the *Broadband Labels Order* and frequently provide prospective customers with such information at the point of sale and on their public facing websites.[68] Accordingly, we adopt the proposal to collect information on service plan data caps.

20. There were no objections in the record to our proposals to collect information on the number of subscribers who have reached their monthly data cap and the average amounts by which subscribers have exceeded their cap, and we adopt those proposals herein. These are necessary pieces of information that will allow the Commission to contextualize the price information obtained through this collection and are also consistent with the requirement in the Infrastructure Act to collect "data *relating* to price and subscription rate information."[69]

21. In addition, we find that collecting information on the charges to subscribers to obtain additional data once the cap has been exceeded is necessary to obtain an accurate view of the month-to-month cost ACP subscribers are paying. Accordingly, this additional information about the average overage amount for subscribers on an annual basis will allow the Commission to determine value that subscribers are obtaining from the affordable connectivity benefit, and whether the federal subsidy is covering data cap overage fees or is otherwise helping reduce the digital divide. We therefore require providers to submit for each plan with at least one subscriber, aggregated at the ZIP code level: the data cap (including de-prioritization and throttling), the number of subscribers who have exceeded the data cap in the previous month, the average amount by which subscribers have exceeded their cap in the previous month as part of the annual aggregate collection of plan characteristic information, and any charges for additional data usages along with the relevant increment (*e.g.*, 1 GB, 500 MB). Providers will be required to report the number of subscribers exceeding the data cap, the average amount by which subscribers exceeded the cap, and the average overage amount paid for the month prior to the snapshot date.

22. In the *ACP Data Collection Notice*, we proposed to define data cap to include data usage restrictions on both pre-paid and post-paid plans, and we adopt this proposal.[70] In so doing, we reject NaLA's argument that we instead should define a data cap as the "ultimate level of data usage above

[64] ACA Connects Comments at 6.

[65] City of Seattle Comments at 2.

[66] WISPA Comments at 4 ("The Commission should not require participating providers to assemble and submit data cap . . . information for ACP purposes as such burdens would discourage small providers from continuing to participate in the program.")

[67] For example, video conferencing applications use between 500mb and 3.2Gb an hour of broadband data. *See* Cable Labs, *Hourly Data Consumption of Popular Video Conferencing Applications*, https://www.cablelabs.com/blog/hourly-data-consumption-of-popular-video-conferencing-applications (last visited Oct. 21, 2022).

[68] *See Broadband Labels Order* at 12-13, para. 35; *see, e.g.*, GCI, *Unlimited prepaid plans*, https://www.gci.com/mobile/plans/fastphone-prepaid-mobile-plans#unlimitedplans (last visited Oct. 25, 2022); Cox, *Learn about Internet Data Usage*, https://www.cox.com/residential/internet/learn/data-usage.html (last visited Oct. 25, 2022).

[69] Infrastructure Act, div. F, tit. V, § 60502(c)(1) (emphasis added); *supra* para. 13.

[70] *ACP Data Collection Notice* at 5, para. 9, n.23.

which the subscriber has no data service."[71] Both throttling (soft caps) and the termination of service if a household exceeds the data allowance impact the ability of consumers to use the service as intended.[72] Furthermore, providers in their advertising materials characterize throttling-based data caps as "data allowances" or "data usage plans."[73] To evaluate the value of the affordable connectivity benefit for households, it is important to consider the view of subscribers, and there is support for our finding that consumers view data termination, and throttling and de-prioritization, effectively as a cap on their usage, which impacts their use and enjoyment of the service.[74] Accordingly, as part of the ACP Transparency Data Collection we will collect from providers information on both data caps and data usage restrictions, such as de-prioritization and throttling, consistent with the definition provided in the *ACP Data Collection Notice*.

23. At the same time, we decline to require providers to submit connection reliability data. In the *ACP Data Collection Notice*, we asked whether we should collect additional plan characteristics beyond those related to speed, bundles, and data caps.[75] Some commenters propose that we require providers to submit information on connection reliability to "help ensure that public money obtains the intended services."[76] We recognize that determining and reporting these data for purposes of the ACP Transparency Data Collection could be unduly burdensome and could require providers to undergo a highly technical determination to be able to produce these data.[77] Although we find that the reliability of a broadband service is a key characteristic in determining the value of the ACP-supported service and this metric would help us evaluate whether low-income consumers are receiving the reliable service they deserve through the Affordable Connectivity Program, requiring providers to collect and report reliability data through this collection would be an overly burdensome undertaking, particularly for small providers, and would be difficult to implement at the aggregate level.[78]

24. *Bundle Characteristics.* In the *ACP Data Collection Notice*, we sought comment on whether to collect information on the characteristics of bundled service offerings (*e.g.*, "triple-play" bundles, unlimited voice/text/data plans), including information about the channels offered on bundled video services.[79] A number of commenters supported the collection of bundle characteristics.[80] Others

[71] NaLA Comments at 8.

[72] *See* Century Link, *What are Data Caps?*, (Oct. 22, 2021), https://discover.centurylink.com/what-are-data-caps.html; Nafeesah Allen, Samantha Allen, *Which Internet Services Have Data Caps?*,, https://www.forbes.com/home-improvement/internet/internet-providers-with-data-caps/ (last visited Oct. 25, 2022).

[73] *See, e.g.*, Verizon, *Prepaid Plans*, https://www.verizon.com/plans/prepaid/ (last visited Oct. 25, 2022) ("[O]nce high-speed data is used . . . you will have 2G speeds the remainder of the month."); Comcast, *Questions & Answers About Our Data Usage Plan*, https://www.xfinity.com/support/articles/data-usage-plan (last visited Oct. 25, 2022) (describing de-prioritization based cap).

[74] *See* GAO, Broadband Internet: FCC Should Track the Application of Fixed Internet Usage-Based Pricing and Help Improve Consumer Education, at 17-19 (2014), https://www.gao.gov/assets/gao-15-108.pdf (noting that focus group participants have "learned to adjust to mobile data allowances and throttling").

[75] *ACP Data Collection Notice* at 5, para. 9.

[76] Common Sense Comments at 7 (the Commission should collect "performance data on the actual quality of internet service including the service's average speed and reliability").

[77] *See* ACA Connects Reply at 8; USTelecom Reply at 3 (arguing against the collection of connection reliability information on the grounds that it would be burdensome and would "exceed the scope" of the Infrastructure Act). *But see* City of New York Comments at 3 (reliability should be included in a data collection).

[78] *See* JSI Comments at 3-4 (describing difficulty of small providers of collecting new information fields).

[79] *ACP Data Collection Notice* at 5, para. 9.

[80] NTCA Comments at 8 ("[T]he Commission should require ACP participating providers to file on an annual basis the details of each internet service offering including . . . an indication of whether the offering is a bundle or standalone broadband offering."); City of Seattle Comments at 4 (supporting collection of bundle characteristics).

opposed the collection of bundle characteristics, arguing that we lacked the authority to collect bundle characteristics or that such a collection would be burdensome and without value to the Commission.[81] As mentioned above, we interpret the Infrastructure Act to permit us to collect plan characteristic information, including bundle characteristics.[82] The fact that the Infrastructure Act refers to a "*broadband* transparency" collection is not determinative in our view, as the Infrastructure Act also directs us to collect "data *relating* to price and subscription rate information."[83] We acknowledge comments describing the burdens on providers, but we find that identifying whether a service is bundled, and the type of services that are bundled together, is essential for providing context for the service plan information we receive through the ACP Transparency Data Collection. Understanding that households are applying their affordable connectivity benefit to a plan that includes bundled voice and/or video service tells us about the services offered by a provider and how ACP households are taking advantage of the benefit. The affordable connectivity benefit can be applied to the voice and text portions of a bundled service plan, and such information is therefore essential to determining the value the affordable connectivity benefit provides enrolled households.[84] Therefore, we require providers to identify whether a service is bundled and the type of the bundle (*e.g.*, voice, video), and to submit voice or text characteristic information for bundled service offerings, including those services included with mobile broadband.[85] Specifically, we require providers to submit as part of the annual collection of plan characteristic information the total number of voice minutes and the total number of text messages allotted on a monthly basis, or whether a voice or text offering includes unlimited minutes or text messages.[86]

25. *Legacy Service Plans.* In the *ACP Data Collection Notice* we proposed collecting information, including price and plan characteristic information, from all ACP participating providers, which would include legacy service plans.[87] Altice argues that "grandfathered plans and other plans that are no longer offered, should not be considered 'internet service offerings' for purposes of this data collection because they are not offered to 'prospective ACP subscribers.'"[88] We disagree with this argument, as the Infrastructure Act is clear that we must collect information related to the price and subscription rates of "each internet service offering of a participating provider . . . to which an eligible

[81] NCTA Comments at 7 (arguing that the IIJA does not authorize the Commission to collect bundle characteristics, and that alternatively as the ACP doesn't apply to video, there is no reason for the Commission to collect information on the video component of a broadband bundle); WISPA Comments at 4 (arguing that the Commission should not collect information on bundles because of the burden that it would impose on small providers).

[82] *See supra* para. 13.

[83] *See id.*; Infrastructure Act, div. F, tit. V, § 60502(c) (emphasis added).

[84] *ACP Order* at 54, paras. 106-07 (describing application of ACP benefit to non-video bundle components).

[85] For the purposes of this collection, we define "bundle" to include non-broadband internet access service offerings, including video, voice, and text. We clarify that apart from voice and text, we are only requiring the submission of whether a service is included as part of a bundle with broadband internet access service.

[86] We acknowledge NCTA's comment about requiring the collection of video characteristics, and do not require providers to submit information regarding the specific characteristics of video bundles (*e.g.*, channels offered) as those services cannot be directly supported by the affordable connectivity benefit. *See ACP Order* at 54, para. 107 (clarifying that while the ACP benefit "cannot go toward the whole value of a bundle that includes video, the data, voice, and/or text messaging portions of the bundle are reimbursable, but the video portion of any bundle must be apportioned out before determining the amount that is reimbursable for broadband purposes by the Affordable Connectivity Program"); *see also* NCTA Comments at 7 (arguing that the Commission cannot collect bundle characteristics because the collection is "limited to broadband transparency, and should not be extended to voice or video service components").

[87] *ACP Data Collection Notice* at 4, 7, paras. 8, 18.

[88] Altice Comments at 7.

household subscribes," and this language clearly does not exclude grandfathered or legacy plans.[89] We acknowledge however, that there are special circumstances surrounding legacy offerings that merit differential treatment, including lower numbers of subscribers, the fact that they are no longer currently marketed, and the burdens associated with collecting certain information. Therefore, we will not require providers to submit information concerning typical speed or latency.[90] We will also not require providers to submit information on the introductory monthly charge, the length of the introductory period, if the monthly charge requires a contract, the number of months of a contract (if applicable), and the one-time fees required at purchase.

26. We will, however, require providers to create and submit unique plan identifiers for legacy service plans in a same or similar format as those used in the broadband labels. Lumen and USTelecom argue that we should not use the ACP Transparency Data collection to impose a requirement to produce broadband labels on grandfathered or legacy plans.[91] We clarify that while providers will need to submit many of the plan and pricing characteristics contained in the labels, they will not be required to create or display a broadband label that the *Broadband Labels Order* would not otherwise require.

1. Affordable Connectivity Program Performance Metrics

27. In the *ACP Data Collection Notice* we proposed to use information in the ACP Transparency Data Collection for the evaluation of the performance of the Affordable Connectivity Program in achieving the goals set in the *ACP Order* and sought comment on the performance metrics we should collect to measure the performance of the Affordable Connectivity Program.[92] The goals we established for the Affordable Connectivity Program are to (1) reduce the digital divide for low-income consumers; (2) promote awareness and participation in the Affordable Connectivity Program; and (3) ensure efficient and effective administration of the Affordable Connectivity Program.[93] For each of these goals, we established performance metrics and methods to measure progress.[94]

28. The information collected through the ACP Transparency Data Collection will help us to evaluate the efficacy of the Affordable Connectivity Program, and to determine the value that ACP enrolled households are obtaining from their benefit. Data on the price and characteristics of plans with ACP enrolled households will help the Commission understand the value that ACP enrolled households are obtaining from the federal subsidy, including which plan characteristics are covered by the benefit, and whether the plans being subsidized are of adequate quality to engage in telework, telehealth, or remote education.[95]

29. *Digital Divide Metrics*. In the *ACP Data Collection Notice*, we asked whether we should, through the ACP Transparency Data Collection, collect information about whether a subscriber is a first-time subscriber to the provider or a first-time subscriber for fixed or mobile broadband, or whether

[89] Infrastructure Act, div. F, tit. V, § 60502(c).

[90] *See supra* para. 17-19, note 61 (describing optional speed and latency fields for legacy plans).

[91] Lumen Reply at 4-5 (requesting that legacy plan data reporting be "done without reference to a broadband label"); USTelecom Comments at 7-8 (arguing that labels for legacy plans are "not only unnecessary but would likely create confusion for customers").

[92] *ACP Data Collection Notice* at 6, para. 12 (citing *ACP Order* at 97, para. 211).

[93] *ACP Order* at 97, paras. 210-13.

[94] *See id.*

[95] *See id.* at 51, paras. 101-02 (describing quality requirements for ACP service plans); *see also* NTCA *Ex Parte* at 2 (arguing that the ACP Transparency Data Collection will allow the Commission to determine whether a $30 subsidy is effective at increasing broadband affordability, and provide insight into the "enrollment preferences" of subscribers).

a household was subscribing to multiple broadband services.[96] In the *ACP Order*, we found that understanding broadband adoption by first-time subscribers would help us measure our progress toward our first goal of narrowing the digital divide for low-income consumers.[97] Commenters opposed the collection of these metrics as part of the ACP Transparency Data Collection, arguing that providers do not collect this information as a matter of course, and that it would be a substantial burden to submit this information.[98] We still recognize the utility of such information in permitting non-profit organizations, local and state governments, and the Commission to more effectively target ACP outreach efforts to underserved households and to fulfill the requirements to collect data necessary for determining the program's progress toward the goal of narrowing the digital divide. But we also find that the ACP Transparency Data Collection might not be the best vehicle for collecting information about first-time users as it could require providers to survey or otherwise assess and report on broadband services the household is receiving beyond those supported by the affordable connectivity benefit. Therefore, although we decline to require the production of such information as part of the ACP Transparency Data Collection at this time, we seek further comment on how we could collect digital divide data in the Further Notice. We also, as discussed above, require providers to submit performance- and equity-related data on the number of ACP subscribers enrolled in Lifeline and ACP subscribers who receive the ACP Tribal or high-cost enhanced benefits. We also reiterate our direction to Commission staff to consider other ways to collect information to determine progress toward the goal of narrowing the digital divide, such as broadband adoption rates for first-time subscribers, and increases in enrollments in areas with low broadband penetration rates.[99] More specifically, we direct the Bureau, with support from OEA, the Consumer and Governmental Affairs Bureau (CGB), and USAC, to explore possible approaches proposed by commenters, such as statistical sampling, or industry or consumer surveys, to collect information about the extent to which ACP subscribers are first-time broadband subscribers, first-time fixed broadband subscribers or are subscribing to multiple broadband services.[100]

30. *Additional Performance Metrics.* In the *ACP Data Collection Notice*, we asked what other data we should collect to measure effectiveness in increasing awareness and participation or the administrative efficacy of the Affordable Connectivity Program.[101] Public Knowledge and Common Sense jointly suggest that we collect information on the ACP enrollment process, connected device offerings, and availability of low-income plans.[102] The City of New York and the Connecticut State Broadband Office propose that the Commission collect information on the availability and performance of service plans.[103] Providers object to proposals to collect information on providers' enrollment

[96] *ACP Data Collection Notice* at 6, para. 12.

[97] *ACP Order* at 98, para. 211.

[98] NaLA Comments at 8 (suggesting that collecting digital divide metrics would be either "impossible or extremely burdensome for ACP providers to collect"); NCTA Comments at 14 (arguing that the Commission should not collect digital divide metrics in this collection).

[99] *ACP Order* at 98, para. 211.

[100] *See* JSI Comments at 6 (suggesting that the Commission use an urban survey to collect additional data beyond price of subscription rates and use "statistical analysis to extrapolate the data."); NaLA Comments at 12 (suggesting that the Commission "work with industry stakeholders to conduct surveys of ACP subscribers.").

[101] *ACP Data Collection Notice* at 6, para. 12.

[102] Common Sense Comments at 11-13 (arguing that the Commission collect information on providers' device offerings, the ACP enrollment process, and subscriptions to restricted low-income plans).

[103] CT OSB Comments at 3 (suggesting that the Commission collect information on plan "performance"); City of New York Comments at 3 (suggesting that the Commission collect information including the "reliability, coverage, network capacity, and latency" of service plans).

processes, connected device offerings, or plan availability and performance.[104] With consideration of the weight of the record, and the administrative and technical difficulties associated with the collection of information related to awareness of and participation in the Affordable Connectivity Program and the efficient and effective administration of the program, we decline at this time to require providers to submit information on the enrollment process, connected device offerings, plan availability or performance. However, we recognize the value of information concerning the ACP enrollment process, and seek further comment on collecting data on the enrollment process, connected device offerings, and the availability of low-income plans, and any burdens on providers or subscribers associated with collecting such information.[105] We also direct the Bureau, with support from OEA and USAC, to explore collecting information regarding ACP enrollment through surveys of ACP participating providers, subscribers, and other stakeholders. Additionally, USAC has recently addressed some of these requests through updates to the Companies Near Me tool.[106] The updated tool now shows which providers offer devices and which providers have indicated to USAC they offer plans fully covered by the standard affordable connectivity benefit.[107] Moreover, as described above, we are collecting information on the number of ACP subscribers who pay $0 after application of the discounts and the ACP benefit.

[104] *See, e.g.*, NCTA Comments at 5 (arguing against collection of plan coverage); CTIA Reply at 2 (opposing collection of plan performance information). NCTA Reply at 2 (arguing that collection of enrollment process and plan performance information is contrary to the statute and highly burdensome).

[105] *See infra* Section IV.

[106] USAC, *ACP Companies Near Me Tool*, https://www.affordableconnectivity.gov/companies-near-me/ (last visited Oct. 25, 2022); *see also* USAC, *ACP – September 2022 Newsletter*, https://www.usac.org/wp-content/uploads/about/documents/acp/bulletins/ACP-September-Newsletter.pdf (last visited Oct. 25, 2022) (describing updates to companies near me tool).

[107] Public Knowledge and Common Sense suggest that as part of the ACP Transparency Data Collection providers disclose whether a subscriber was enrolled in a restricted low-income plan along with the Affordable Connectivity Program. Common Sense Comments at 13. We find that the data collection requirements we adopt today will collect sufficient information on plan characteristics and pricing of ACP-supported plans, including those that may be offered only to ACP-eligible households and other low-income households, to allow the Commission to determine the value the affordable connectivity benefit provides low-income households. Therefore, we decline the request.

Applicant Details

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JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**June 4, 2021**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Law Journal**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Connecticut**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am a 2021 graduate of Yale Law School and am writing to apply for a clerkship in your chambers for 2023-2024. I am inspired by your commitment to the fair and equal administration of justice and support of public interest.

I am a civil rights attorney with a longstanding commitment to and passion for advocating for children. My background, encompassing close to two years of public interest experience since graduating and a deep interest in legal ethics, has shaped my perspective on the law and cultivated a passion for justice.

I am currently a staff attorney with Children's Rights, a New York-based nonprofit, where I work exclusively on federal class-action litigation in multiple jurisdictions. My practice spans multiple bodies of law including Civil Procedure, Administrative Law, Constitutional Law, Disability Law, and Health Law. In my previous role as a legal fellow at the Center for Children's Advocacy, I provided direct legal services to children and young adults. That experience honed my skills for navigating legal challenges with compassion and empathy, as well as distilling complex legal terminology into clear and easy-to-understand language.

During law school, I served as an Executive Editor of the Yale Law Journal, where I oversaw both YLJ Forum, the Journal's online content, as well as Features and Book Reviews. That experience furthered my ability to engage with new bodies of law, collaborate effectively, and manage competing deadlines.

Beyond my legal skills and passion for public interest work, I bring a strong work ethic, attention to detail, and dedication to excellence in my work. My commitment to ethics is central to my professional identity and that dedication enables me to approach complex legal dilemmas with integrity, sound judgment, and a profound focus on the ethical responsibilities of the profession.

My resume, list of references, law school transcript, and two writing samples are enclosed. Professor Anne Alstott, Clinical Lecturer Tadhg Dooley, and Jay Sicklick are submitting letters of recommendation on my behalf.

I am happy to provide any additional information you might seek and would welcome the opportunity to interview with you.

Thank you so much for your consideration.

Sincerely,

/s/ Bianca Herlitz-Ferguson

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EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D. 2021
Activities: *Yale Law Journal*, Executive Editor, *Forum*, Features & Book Reviews Vol. 130
Educational Opportunity and Juvenile Justice, Clinical Student 2020 – 2021
Youth Justice Project, Co-Founder & Co-Director 2020 – 2021
Professor Douglas Kysar, Research Assistant 2019 – 2020
Pediatric Medical Legal Partnership, Clinical Student 2019 – 2020
Marshall Brennan Constitutional Literacy Project, Teacher 2019 – 2020
Law, Ethics, and Animals Program, Student Fellow 2019 – 2020
Professor Anne Alstott, Research Assistant 2019
Black Law Student Association, Member 2018 – 2021

CORNELL UNIVERSITY, Ithaca, NY
B.A., *magna cum laude*, Government and Philosophy 2015
Honors: Clyde A. Duniway Prize, awarded annually to an outstanding student with a major in Government
Einhorn Discovery Grant Recipient, awarded for honors thesis research
Honors Thesis: *Assessing the Nature of Change: The Supreme Court and Juvenile Sentencing*
Activities: 4-Year NCAA Division I Diver, Women's Swimming & Diving 2011 – 2015
Writing Tutor, John S. Knight Institute Writing Walk-In Service 2012 – 2015
Crisis Counselor & Trainer, Empathy Assistance & Referral Service 2012 – 2015

EXPERIENCE

Children's Rights, New York, NY July 2022 – Present
Staff Attorney. Staff case teams pursuing federal class-action litigation on behalf of children and families. Research and draft memoranda analyzing federal statutory rights under Medicaid, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. Draft trial court motions and briefs. Assist with discovery matters.

Fellowships at Auschwitz for the Study of Professional Ethics, Germany & Poland May 2023 – June 2023
Law Fellow. Participated in an intensive two-week fellowship that centered professional ethics by investigating the conduct and role of professionals in enabling the Nazi state and critically examining ethical issues in contemporary practice.

Center for Children's Advocacy, Bridgeport, CT September 2021 – July 2022
Singer Connecticut Public Service Fellow Attorney. Represented undocumented children in Connecticut probate courts to obtain special immigrant juvenile status findings. Represented transition-age youth and young adults over 18 in the care of the Connecticut Department of Children and Families in administrative hearings. Provided legal consultations to youth through a school-based legal clinic to alleviate legal barriers that interfere with students' abilities to succeed in school.

Advanced Appellate Litigation Project, New Haven, CT August 2020 – June 2021
Clinical Student & Qualified Law Student, Third Circuit. Represented a pro se client before the United States Court of Appeals for the Third Circuit. Drafted appellate briefs and argued client's appeal of the denial of his petition for habeas corpus under 28 U.S.C. § 2254.

U.S. Department of Justice, Civil Rights Division, Special Litigation Section, Washington D.C. Summer 2020
Intern. Conducted legal research and writing with respect to constitutional and civil rights of people in state and local institutions, individuals with disabilities, individuals who interact with state or local police, and youth involved in the juvenile justice system. Drafted memoranda on waiver of counsel and the *Rooker-Feldman* doctrine.

Youth Law Australia, Kingsford, Australia August 2019
Intern. Researched children's participation rights and barriers to exercising them in Australia's Family Law System. Conducted intakes with clients seeking legal advice on a wide array of issues affecting young people under 25 years of age.

University of Michigan Law School, Ann Arbor, MI May 2019
Bergstrom Child Welfare Law Fellow. Completed a selective fellowship at the University of Michigan focused on child welfare law and practice.

Office of the Defender General, Juvenile Division, Montpelier, VT May 2019 – July 2019
Summer Law Clerk. Drafted amicus and appellate briefs submitted to the Vermont Supreme Court. Reviewed discovery to assist with litigation related to civil rights violations. Interviewed clients and supported attorneys representing children in administrative proceedings.

Children's Rights, New York, NY 2016 – 2018
Paralegal. Supported attorneys pursuing large scale impact litigation to uphold the constitutional and civil rights of children in state care across the United States. Conducted factual research, drafted memoranda, participated in stakeholder outreach, and managed discovery files.

CASA of The Southern Tier, Painted Post, NY 2013 – 2018
Court Appointed Special Advocate Volunteer. Appointed by a family court judge to represent the best interest of abused and neglected children in dependency proceedings. Maintained regular contact with client children and professionals. Submitted periodic reports to the court. Awarded 2018 Volunteer of the Year.

BAR ADMISSIONS

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SKILLS AND INTERESTS: Animal Rights, CrossFit, Conversational German, Country Music, Ethics.

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LAW	11001	Contracts I: Group 1	4.00	CR	L. Brilmayer
LAW	12001	Procedure I: Section B	4.00	CR	H. Koh
LAW	13001	Torts I: Section A	4.00	CR	G. Calabresi
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LAW	21051	FedIncTax:BusFinanceBasics	1.00	CR	A. Alstott
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LAW	20097	Medical Legal Partnerships	3.00	H	A. Gluck, R. Iannantuoni, K. Kraschel
LAW	20104	Social Justice	4.00	H	B. Ackerman
LAW	20407	ChildDevelopmentLawPolicyLab	2.00	H	A. Alstott
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LAW	21407	ChildDevelopmentLawPolicyLab	1.00	H	A. Alstott
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JUDITH CALVERT, REGISTRAR

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SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
LAW	30200	AdvAppellateLitigation Project	3.00	H	T. Dooley, D. Roth
		Term Units 14.00	Cum Units	74.00	
Spring 2021					
LAW	21249	InterveneCriminalYouthQueerTra	2.00	H	M. Bell, S. Violante-Cote, C. Desir, E. Bildner
LAW	21461	Children and the Law	3.00	H	J. Katz
LAW	30111	Advanced EOJJ Clinic	2.00	H	J. Forman, E. Shaffer, M. Gohara
LAW	30200	AdvAppellateLitigation Project	3.00	H	T. Dooley, D. Roth
LAW	40001	Supervised Research	3.00	H	A. Alstott
		Supervised Analytic Writing			
		Term Units 13.00	Cum Units	87.00	

********** END OF TRANSCRIPT **********

JUDITH CALVERT, REGISTRAR

Official transcript only if registrar's signature, university seal and date are affixed.

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

It is with great pleasure that I write in support of Bianca Herlitz-Ferguson's application for a clerkship with your court. Based on my interactions and collaboration with Bianca in the year that she worked at the Center for Children's Advocacy (CCA), and my understanding of the unique qualities and characteristics that best match a clerkship candidate, I wholeheartedly believe that Bianca is not only qualified for the clerkship but will be an incredible asset to your court.

I am the Deputy Director of CCA and an attorney who has worked for the past twenty-three years on issues involving children's health and child welfare in Connecticut. CCA is the largest non-profit legal organization in New England devoted exclusively to protecting and advocating on behalf of the legal rights of children. CCA is affiliated with the University of Connecticut School of Law (UConn) and provides holistic legal services for poor children in Connecticut communities through individual representation, education and training, and systemic advocacy. I also submit this recommendation on Bianca's behalf as an adjunct professor of law at the UConn School of Law where I have taught legal ethics and professional responsibility for over twenty years, and as a assistant clinical professor of medicine in the Department of Pediatrics, University of Connecticut School of Medicine.

Bianca began her tenure in our office in September 2021, shortly after her graduation from Yale Law School. She earned a prestigious Singer Connecticut Public Service Fellowship and chose our office to engage in work focusing on teen legal advocacy with issues revolving around homeless youth rights, child welfare and immigration advocacy. It quickly became apparent that Bianca was extraordinarily talented and lived up to her academic bona fides by not only providing incredibly powerful intellectual assessments of complex legal issues, but more importantly grasping and enveloping herself in the difficult and emotionally challenging world of representing vulnerable teenagers and youth, replete with legal and ethical real-world crises.

While I do not have direct experience in judging Bianca's academic performance, or her in-class experience during law school, I believe that I am qualified to opine on her day-to-day work as a first-year lawyer, and how the skills she demonstrated during her year at CCA will positively reflect as a judicial clerk.

First – Bianca's representation of vulnerable teenagers and youth as a Singer Fellow will enrich your court's discourse given her acute awareness of ethical dilemmas while representing populations at-risk and equally as important her willingness to seek assistance when these ethical dilemmas occurred. Representing vulnerable children and youth, especially in communities where legal exposure may result in detention or deportation (due to immigration status), is fraught with ethical pitfalls. As a long-time ethics professor and practitioner at CCA, I am typically the person whom most colleagues seek out when working on ethically complex issues. I can relay several instances where Bianca reached out not to merely seek my advice, but to engage in thoughtful dialogue about the need to do the "right thing" for clients – even though the Rules of Professional Conduct may have seemed counter-intuitive or even punitive. I particularly remember a case where her teenage client's "best interest" conflicted with that client's expressed wishes – and Bianca's keen sense of ethical awareness led her to agonize over how to best represent the client in accordance with her ethical obligations – all while managing to remain loyal to her client and assist the client in removing herself from a dangerously precarious situation.

Second – Bianca demonstrated exceptional lawyering skills during her fellowship, especially in the area of written work-product. This assessment does not imply that she lacks acuity and skill in verbal advocacy (hardly the case), but her written analysis stood out as equal to if not superior than any first-year lawyer with whom I've worked in my twenty-three years at CCA. In particular, I asked Bianca to collaborate with me on an amicus curiae matter, In re Amias I, a complicated child welfare appeal pending in the Connecticut Supreme Court. Bianca took the lead on researching and writing up complex legal analyses and conferencing with our amicus partner (a pro-bono law firm). I fondly remember her telling me that she was a "child welfare law geek" at heart during the course of our work together on this case. Her recognition of the subtleties and nuances of the issue on appeal (our particular concern) was immediately apparent and provided extraordinary guidance to our pro bono partner. My only regret in reviewing that episode was that I did not ask Bianca to write the brief, which had she done may have had more impact than the one which actually was submitted to the Court.

Finally, I believe that Bianca has the wherewithal and skills to become a leader in her field, which at this point in time is devoted to preserving and expanding the constitutional and civil rights of children and families. Bianca's present employer, Children's Rights, is a national leader in advocating for children and families, especially in the areas of child welfare, juvenile justice, unaccompanied minors and LGBTQ rights. While we were sorry to lose Bianca as a colleague, dedicated advocate and friend, we were thrilled that she moved on to an organization that is so deeply rooted in the areas of the law in which she excels and loves. I am confident that she will continue to make her presence felt in the core legal subjects where passion, dedication and skill matter most – advocating for underserved children and youth who strive for equity in all areas of daily life.

Finally, on a personal note, I believe that a clerkship is a perfect opportunity for a court/judge to mentor an extremely qualified and passionate lawyer who seeks to learn and grow as an intellectually gifted advocate. She is truly a pleasure to work with and I miss our interactions and discussions on complicated and ethically demanding cases. I am confident that she will be a great addition to your court and be a wonderful colleague to collaborate with during the term of a clerkship.

Jay Sicklick - JSicklick@cca-ct.org - 8607128822

Thank you for providing me with this opportunity to write a letter in support of Bianca's application. If you have any questions or would like additional information, please don't hesitate to contact me at jsicklick@cca-ct.org or on my cell at (860) 712-8822.

Sincerely,

/S/ Jay E. Sicklick

Jay E. Sicklick
Deputy Director
Director, Medical-Legal Partnership

Center for Children's Advocacy

UConn School of Law

65 Elizabeth St.

Hartford, CT 06105

(860) 570-5327 Ext. 257

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to recommend Bianca Herlitz-Ferguson to serve as a law clerk in your chambers. As a former clerk to both district and circuit judges, I have some understanding of what makes a good law clerk; as an attorney in private practice, I have some understanding of what makes a good lawyer; and, as a lowly "Visiting Clinical Lecturer" at the most elite law school in the world, I have some understanding of what allows a person to maintain an even keel amidst a sea of "Masters of the Universe." Bianca possesses all these qualities, which is why I believe she will be a welcome addition to your chambers.

I came to know Bianca in my capacity as co-director of the Yale Law School Advanced Appellate Litigation Project, which is a clinic offering students the opportunity to represent otherwise pro se appellants in the federal courts of appeals--primarily the Second and Third Circuits. The clinic has become an extremely popular offering over the last several years, largely because we require our students to really take on ownership of our matters and because--while our clients tend to come from marginalized backgrounds--we are not regarded as an "issue oriented" clinic. I provide this background merely by way of emphasizing that we get a lot of applicants, and we take very seriously the task of selecting students whose applications demonstrate not only high academic achievement but also the qualities of being a good team player and a good person, besides. By definition, all of our applicants are Yale Law Students, the cream of the crop. But we look for something more, and we've been quite successful in filling our rosters with uniformly impressive students. All that said, Bianca is one of my favorites.

Bianca was a key member, and ultimately the leader, of a team of students working on a habeas appeal involving a claim of ineffective assistance of counsel in plea bargaining. Habeas appeals tend to be among the most interesting, but by far the most difficult, of the matters our clinic handles. The records are almost by definition extremely long and complex and the students must master all of the facts and nuances contained therein, while keeping straight the shifting legal standards that have accompanied a case through a state direct appeal, a state collateral proceeding and appeal, and a federal collateral proceeding before it has even reached us. Bianca impressively marshaled all of the facts necessary to pursue relief and played a key role in crafting what I felt to be a very compelling set of briefs in a longshot appeal. Perhaps more impressive, she then committed all of this to memory and calmly and assuredly presented oral argument before a very active panel of Third Circuit judges. While we did not ultimately prevail (we're used to losing, I'm afraid), I was extremely impressed with Bianca's skills as a lawyer and her compassion for our client.

In addition to being extraordinarily reliable and competent, Bianca is a pleasure to work with. She has no ego, no sense of entitlement; she just wants to do her part to advance a shared goal. And, when I got to know her a bit in the course of traveling for argument, I found her to be incredibly mature, with a very full and interesting life outside the law.

In short, Bianca was one of my favorite students, and I feel confident that she will be an excellent addition to your chambers.

Please don't hesitate to reach out to me if you have any questions regarding her application.

Tadhg Dooley - tdooley@wiggin.com - 203 498 4549

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am delighted to offer my highest recommendation for Bianca Herlitz-Ferguson. She is among our best students academically, and she is thoughtful, insightful, and committed to using law to promote children's well-being. She would be an outstanding law clerk.

I first met Bianca when she worked for me as a research assistant in her first year of law school. Her assignment was to identify existing research on medical-legal partnerships and to classify the research by quality and subject matter. She did an outstanding job, producing a detailed memo of 20 single-spaced pages that served as a guide to the literature.

Bianca was also a student in two of my classes. In Child Development and the Law, she did outstanding work and earned an H. Her work in Federal Income Taxation was also extremely solid but, because of the grading curve, fell at the top of the P range.

As you can see from Bianca's resume, she has a long and deep history of working for children's welfare. In law school, she took every opportunity to deepen her legal knowledge and put it to practical use. To take just one relevant example, Bianca worked with Alice Rosenthal at the medical-legal partnership sited in the YNHH Children's Hospital. The medical-legal partnership handles a range of legal issues for children and their families, and I know from speaking with Alice that Bianca was outstanding as an intern.

My recitation of Bianca's accomplishments cannot quite capture how thoughtful, determined, and committed she is. She is at once a fierce lawyer and a quiet presence who inspires confidence. If I were hiring clerks, Bianca would be right at the top of all the Yale students I know.

Please call me at 203-415-9832 (cell) if I can tell you more about Bianca.

Very truly yours,
Anne L. Alstott
Jacquin D. Bierman Professor

Anne Alstott - anne.alstott@yale.edu - _203_ 436-3528

Bianca Herlitz-Ferguson

WRITING SAMPLE I

As a Summer Intern with the Department of Justice, Civil Rights Division, Special Litigation Section, I prepared a memorandum for the Juvenile Practice Group. This memorandum examined Eighth Circuit law regarding waiver of counsel and whether age is a relevant factor in determining the validity of such a waiver.

I have received permission from the Department of Justice to use this memorandum as a writing sample. To preserve confidentiality, I have removed any reference to specific jurisdictions or case-specific applications. The views and analysis expressed herein are entirely my own and do not reflect those of any other person or organization.

To: Supervising Attorneys
From: Bianca Herlitz-Ferguson
Date: June 12, 2020
Subject: Eighth Circuit Law on Waiver of Counsel

MEMORANDUM

I. Introduction

When their liberty is at stake, children facing delinquency charges are constitutionally entitled to the right to counsel. *In re Gault*, 387 U.S. 1, 28 (1967). The Supreme Court has recognized that children "need[] the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36. Despite *Gault*'s promise and youths' known vulnerabilities, state courts nationwide allow youth to waive their right to counsel without adequate protections. The vast majority of states allow children to waive their right to counsel without first consulting an attorney despite evidence that "far too many children do not understand the role of their lawyer, how defense attorneys are positioned to protect them, or the consequences of forgoing representation."[1] This Memorandum discusses the Eighth Circuit's approach to evaluating constitutionally sufficient waiver of counsel.

To be constitutionally sufficient, state trial courts must conduct a two-part inquiry to determine whether a waiver of counsel is valid. First, those courts must find that a defendant is competent and understands the proceedings. Second, the court must determine that their waiver of rights is knowing and voluntary. The particular characteristics of the defendant determine how probing the judge must be during a colloquy. Relevant factors include a defendant's upbringing, education, mental health, familiarity with the criminal justice system, and age. While age is one

[1] NAT'L JUVENILE DEFENDER CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 26 (2017).

factor in assessing the validity of waiver of constitutional rights, it is an essential factor to consider in the context of children given their comparative lack of education, inexperience with the justice system, and lesser ability to clearly consider the consequences of waiver.

II. Discussion

A. In the Eighth Circuit, courts must conduct a two-part inquiry to determine whether a waiver is valid.

In order to determine whether a waiver is valid, a trial court must engage in a two-part test to determine whether the defendant is both competent to waive counsel and whether the defendant in fact did waive counsel knowingly and voluntarily. *Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003) (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993)). The right to counsel "invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). For that reason, the law imposes an affirmative obligation on trial courts to evaluate whether a constitutional right is validly waived: "[t]he protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson*, 304 U.S. at 465. Because counsel is "crucial to our adversarial system of justice," trial courts must "indulge every reasonable presumption against the waiver." *Wilkins v. Bowersox*, 145 F.3d 1006, 1011 (8th Cir. 1998) (quoting *Johnson*, 304 U.S. at 464).

In making such a determination, a court must consider "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981)). The nature of that inquiry varies based on the particular facts and circumstances of the case and the defendant. While some circumstances require "a specific on the record warning of the dangers and disadvantages of self-representation," that is

"not an absolute necessity in every case for a valid waiver of counsel." *Meyer*, 854 F.2d at 1115. Other circumstances may require less. *Id.* In each case, however, that inquiry must involve two questions. First, the court must ask whether the defendant is competent to waive their right to counsel. Second, the court must ask whether the defendant knowingly and voluntarily did so in this case. *See Godinez v. Moran*, 509 U.S. 398, 400 (1993). I address the specific requirements of each question in turn.

a. Competency

A finding of competency is a necessary but not sufficient component of knowing and voluntary waiver. A defendant may be found competent to waive the right to counsel but not otherwise be found to have done so knowingly and voluntarily. To determine whether a defendant is competent to waive counsel, the court must ask: does the defendant "have the ability to understand the proceedings?" *Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003). The competency standard here is the same as that in the case of competency to stand trial. *Godinez v. Moran*, 509 U.S. 389, 391 (holding that the competency standard for pleading guilty or waiving counsel is the same as the competency standard for standing trial). Due process here does not require more than the *Dusky* standard for determining competency to stand trial. *Id.* at 402. In both cases, the court must determine whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether he has "a rational as well as factual understanding of the proceedings against him?" *Id.* at 396 (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*)). However, a finding of competency is only the starting point to determining a constitutionally valid waiver of counsel. The court must then go on to "satisfy itself that the waiver of . . . constitutional rights is knowing and voluntary." *Id.* at 400.

b. Knowing and Voluntary Waiver

The Eighth Circuit holds that "[t]he 'key inquiry'" in assessing the validity of "a Sixth Amendment waiver to determine whether it was knowingly and intelligently made" requires asking "whether the accused was 'made sufficiently aware of his right to have counsel' and 'of the possible consequences of a decision to forgo the aid of counsel' so that his choice is made with his eyes open." *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) (quoting *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988)). That inquiry is pragmatic in its approach. *Id.* Two factors are particularly relevant to the court's fact-intensive analysis. First, the court should investigate what role counsel plays at the relevant stage of the proceeding. *Id.* Second, and more specifically, the court should reflect on the particular assistance counsel could provide to the defendant at that stage. *Id.* Both factors "determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Id.* (quoting *Patterson*, 487 U.S. at 298).

B. Where the characteristics of the defendant are likely to compromise their decision-making ability, the Eighth Circuit suggests that a court's colloquy must probe deeper to ensure that constitutional rights are validly waived.

The Eighth Circuit suggests that a trial court's inquiry should be more demanding, where factors make it less likely that a defendant could make "knowing, voluntary, and intelligent decisions." *Shafer v. Bowersox*, 329 F.3d 637, 649 (8th Cir. 2003). A thorough colloquy that more closely aligns with the Supreme Court's plurality decision in *Von Moltke v. Gillies* may be constitutionally necessary where factors such as mental health history, upbringing, education, and young age compromise decision-making abilities. 332 U.S. 708 (1948). In *Von Moltke*, a plurality of the Supreme Court held that the right to counsel "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent

waiver by the accused." *Id.* at 723. That inquiry requires that a judge "investigate as long and as thoroughly as the circumstances of the case before him demand" *Id.* at 723-24. The factors to be considered include whether the defendant understands: the "nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Id.* at 724. *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998) and *Shafer v. Bowersox*, 329 F.3d 637 (8th Cir. 2003) provide two instructive examples of when the Eighth Circuit may require a more demanding colloquy from a state trial court judge.

a. Wilkins v. Bowersox

In *Wilkins v. Bowersox*, the Eighth Circuit held that a state trial court's colloquy was insufficient to protect the defendant's constitutional rights when he waived his right to counsel and pled guilty. 145 F.3d 1006, 1012 (8th Cir. 1998). The defendant was sixteen years old when he confessed to robbery and murder. *Id.* at 1008. He was tried in adult court, waived his right to counsel, and pled guilty to both charges. He openly expressed that he wanted the death penalty for himself. The Eighth Circuit identified three fundamental problems with the trial court's colloquy to determine whether Wilkins knowingly, intelligently, and voluntarily waived his right to counsel during the adjudicatory stage.

First, the Eighth Circuit held that the trial court's colloquy was inadequately probing as to whether Wilkins knowingly, intelligently, and voluntarily waived his right to counsel. The trial judge's colloquy "consisted predominantly of leading questions that failed to allow Wilkins to articulate his reasoning process." *Id.* at 1012. Wilkins's answers to these leading questions regarding his "intention to waive his right to counsel" consisted of "simple 'yes' and 'no' answers." Such a pro forma inquiry "does not conclusively establish that his waiver of counsel

was valid." *Id.* Judges have an "obligation to penetrate the surface with a more probing inquiry to determine if the waiver is made knowingly, intelligently, and voluntarily." *Id.* (citing *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948)). That requires more than simply "*attempt[ing]* to explain all of the available options." *Id.* The burden is on the judge to adequately inform and spell out the implications of the waiver in a way that the defendant can understand. The trial court in this case should have "explain[ed] to Wilkins his possible defenses to the charges against him" and "inform[ed] him of lesser included offenses or the full range of punishments that he might receive." *Id.* The court did neither. The Eighth Circuit here suggests that a valid colloquy for such a defendant requires that the judge actually explain possible defenses to the charges brought as well as the scope of potential sentences. In addition, the judge should provide time and space for the defendant to explain his reasoning for seeking a waiver.

Second, the Eighth Circuit established that the trial judge in this case was required to tailor the colloquy to the defendant's unique characteristics: "a defendant's background and personal characteristics are highly relevant in determining the validity of such a waiver." *Id.* The Eighth Circuit suggests that unique characteristics of the defendant include: age, education, upbringing, and mental health history. The lower court in this case "failed to adequately address and consider Wilkins's background in determining the validity of his waiver of counsel." *Id.* The judge acknowledged Wilkins's age and limited education but failed to fully consider both his difficult upbringing, including severe abuse at the hands of relatives, and Wilkins's demonstrated history of mental illness and substance abuse beginning at a young age. *Id.* at 1013. Those factors were particularly important because "Wilkins' youth, troubled background, and substantial mental impairments clouded his decision-making throughout the state proceeding." *Id.* at 1015. The Eighth Circuit thus held that "[g]iven the combination of Wilkins' young age and the record

evidence of his severely troubled childhood, the state trial court's colloquy with Wilkins was far from the kind of in-depth inquiry that is necessary to ensure a valid waiver of counsel." *Id.* at 1013.

Third, the Eighth Circuit held that the trial court erred in concluding that Wilkins's waiver of right to counsel was valid simply because he was found competent to stand trial. *Id.* In order to "satisfy itself that the waiver of his constitutional rights is *knowing and voluntary*," the "competency inquiry" as applied to the waiver of counsel goes further than just "the ability to understand the proceedings." *Id.* (quoting *Godinez v. Moran*, 509 U.S. 398, 400). Competency for purposes of a valid waiver of rights focuses on "determining 'whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id.* (quoting *Godinez*, 509 U.S. at 401). It is therefore legal error for a court to conclude that a defendant validly waived counsel on the grounds that they are competent to stand trial. Further, the Eighth Circuit rejected the state court's conclusion that a trial court's "opportunity to observe" the defendant and the defendant's "use of standby counsel" are sufficient to uphold the validity of a waiver. Those factors "do not necessarily lead to the conclusion" that the defendant "voluntarily and intelligently waived counsel." *Id.*

b. *Shafer v. Bowersox*

In *Shafer v. Bowersox*, Robert Shafer, upon waiving his right to counsel and his right to a jury trial, pled guilty to two counts of both first-degree murder and armed criminal action in Missouri state court and was sentenced to death. 329 F.3d 637, 637 (8th Cir. 2003). Like Wilkins, Shafer indicated a desire to be sentenced to death. *Id.* In this case, the state trial court "asked few questions . . . with respect to Shafer's wavier of counsel for the guilt phase and did not fully inform him about his possible options or the choices he faced." *Id.* at 647. The court "never probed beneath the surface of Shafer's declaration that he wanted to waive his right." *Id.*

at 648. Such a cursory inquiry was constitutionally insufficient as applied to this defendant for reasons similar to those elucidated in *Wilkins*.

As in *Wilkins*, the Eighth Circuit read *Von Moltke*'s "penetrating and comprehensive examination" to require further probing in *Shafer*. It is not enough for a court to advise a defendant like Wilkins or Shafer that "it would be to his advantage to have an attorney," and warn that "he would be giving up the right to attack the performance of his attorneys" by waiving his right to counsel. *Id.* Where a defendant's ability to make informed decisions is clearly compromised in some way, such remarks fail to adequately and satisfactorily "advise him of specific dangers or limitations related to self-representation." *Id.* In *Shafer*, the Eighth Circuit held that "[a] thorough colloquy was even more important" in Shafer's case because his "mental condition" and diagnoses of "depression, personality disorders, and other psychological problems caused impulsive and irrational decision making and frequent mind changes." *Id.*

Both *Wilkins* and *Shafer* indicate that where the trial court is aware of factors and characteristics about a defendant that may compromise their decision-making ability, constitutional protections require the court to undertake a more demanding, thorough, and careful waiver of counsel in order to ensure that a more vulnerable defendant knowingly, intelligently, and voluntarily waived their constitutional rights.

C. Where individual circumstances suggest that a defendant is more capable of making decisions, the Eighth Circuit establishes that trial courts may engage in a less demanding waiver colloquy.

The Eighth Circuit does not require a rigorous and exacting waiver colloquy in all cases. Acknowledging that the Supreme Court's decision in *Von Moltke* was merely a plurality decision, the Eighth Circuit in *United States v. Kiderlen* qualified *Wilkins* and emphasized that '[n]either the Supreme Court nor this court . . . has adopted the *Von Moltke* plurality opinion in

all of its particulars." 569 F.3d 358, 367 (8th Cir. 2009). As a result, *Wilkins* "is best understood as a case-specific application of the general principle that our assessment of a waiver depends 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.* (quoting *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988)). The Eighth Circuit thus "reject[ed] Kiderlen's contention that a waiver of the right to counsel must exhibit all of the features discussed in *Wilkins* before it is deemed knowing and voluntary." *Id.*

While *Kiderlen* involved a defendant facing federal charges in the Eastern District of Missouri, the particular characteristics of the defendant indicate why a less demanding colloquy may be constitutionally sufficient in some cases. Unlike the defendants in *Wilkins* and *Shafer*, several factors supported a finding that Steven Kiderlen was capable of knowingly and voluntarily waiving his right to counsel. First, Kiderlen not only graduated high school but also completed one year of college. Second, a psychological evaluation of Kiderlen demonstrated sophisticated thinking abilities. Third, Kiderlen had fifteen prior convictions that indicated significant familiarity with the criminal justice system. *Id.* at 366. Because of those factors, the colloquy was considered constitutionally sufficient where the court explained the charges as well as possible penalties he faced and to which Kiderlen "responded appropriately." *Id.* Additionally**,** the judge "stress[ed] at some length the complex duties of counsel in a criminal trial and recommend[ed] that Kiderlen accept representation by a trained attorney." *Id.*

Knowing and voluntary waiver of counsel does not require that the court make a determination that a defendant may adequately or successfully represent himself pro se. It merely requires that a defendant is "'made sufficiently aware of his right to have counsel' and 'of the possible consequences of a decision to forego the aid of counsel.'" *Jones v. Norman*, 633 F.3d

661, 667 (8th Cir. 2011) (citing *Meyer*, 854 F.2d at 1114). This does not require a sophisticated level of knowledge or understanding of legal rules and procedures, for example. The "background, experiences, and conduct of the accused" informs the "amount of information a court needs to provide" and the "amount of inquiry the court is required to make to test the defendant's understanding." *Id.* at 667.

A judge conducting a colloquy also need not anticipate and spell out all disadvantages that a defendant may face as a result of waiving counsel and proceeding pro se. In *Overton v. Mathes*, the defendant challenged a trial court's finding that he validly waived his right to counsel. 425 F.3d 518 (8th Cir. 2005). Specifically, he argued that he could not have knowingly and intelligently waived this right, because the state trial judge failed to inform him that he would have to wear leg restraints while he argued his own case. This omission, he argued, failed to adequately allow him to understand the "disadvantages of representing himself." *Id.* at 521. In this case, there was evidence to suggest that the trial court judge did not know that Overton would be required to wear leg restraints. *Id.* at 520. Further, the record indicated Overton objected to wearing leg restraints before the trial began, which was sufficient indication that he understood the disadvantage he would face should he proceed pro se and with them. *Id.* The Eighth Circuit noted that it was satisfied that given this defendant's prior courtroom experience and understanding of the law, the judge's colloquy was constitutional as applied and the court was not required to ensure that a defendant understood that he would be particularly disadvantaged by a specific factor like wearing leg restraints during the trial. Again, this case supports the conclusion that the specific characteristics and experience of the defendant drive the nature of the court's obligations in determining the validity of a waiver.

D. Based on Eighth Circuit precedent, trial courts should engage in a demanding inquiry before accepting a. youth's waiver of counsel.

The Eighth Circuit recognizes that special concerns are at play when youth waive constitutional rights: "[s]pecial caution is of course required when analyzing the waiver of constitutional rights by juveniles." *McDonald v. Black*, 820 F.2d 260, 262 (8th Cir. 1987). This is particularly important where "the state's failure to follow its criminal procedures deprives" a youth "of fundamental fairness in his criminal trial." *Id.*

Wilkins and *Shafer* do suggest that courts undertake additional measures to assure that youth are validly waiving their constitutional rights. The *Wilkins* court specifically took account of the defendant's "young age" of sixteen in holding that both his waiver of counsel and guilty plea were invalid. *Wilkins v. Bowersox*, 145 F.3d 1006, 1008, 1013 (8th Cir. 1998). Thus, age is clearly a relevant factor and something that the Eighth Circuit has acknowledged. While age was not an acknowledged factor in *Shafer*, the court took note of Shafer's mental health history and other characteristics that made him an "impulsive and irrational decision mak[er]." *Shafer v. Bowersox*, 329 F.3d 637, 649 (8th Cir. 2003). The scientific advances that demonstrate the compromised decision-making abilities of youth are what have motivated the Supreme Court in recent decades to provide additional protections for youth. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (holding mandatory life without parole unconstitutional as applied to children, in part because "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking); *J.D.B. v. North Carolina*, 564 U.S. 261(holding that age is relevant to *Miranda* custody analysis); *Graham v. Florida*, 560 U.S. 48 (2010) (holding life without parole for nonhomicide offenses categorically unconstitutional as applied to individuals who committed an offense prior to age 18); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (holding the death penalty unconstitutional as applied to

children). Applying that line of reasoning to the Eighth Circuit's concerns in addressing the colloquies in *Wilkins* and *Shafer* support an argument that a child or adolescent's age should categorically require heightened protections when they waive constitutional rights. While *Wilkins* and *Shafer* may be extreme cases, courts are obliged to require individual assessment regardless of the circumstances.

III. Conclusion

To be constitutionally sufficient, the Eighth Circuit requires state trial courts to conduct a two-part inquiry to determine whether a waiver of counsel is valid. That inquiry is fact-intensive and requires the court to tailor the colloquy to the specific characteristics of the defendant. First, courts must find that a defendant is competent and understands the proceedings. Second, the court must determine that their waiver of rights is knowing and voluntary. Age is one factor in assessing the validity of a waiver of constitutional rights. Furthermore, it is an essential factor to consider, since children and adolescents have less education than adults, little or no experience with the justice system, and may lack the requisite reasoning abilities to consider the consequences of waiver. Where youth are involved, their age likely establishes the necessity for a court to probe further when considering all the factors required for a valid waiver.

Bianca Herlitz-Ferguson

WRITING SAMPLE II

The following writing sample is an excerpt from an academic paper I wrote under the supervision of Professor Anne Alstott in 2021. It evaluates the current state of Children and the Law scholarship and comments on the ways in which scholars in the field utilize developmental science.

The excerpt includes only the Introduction, Part II, and the Conclusion of the Essay. I have omitted Part I, which evaluates four prominent frameworks in the field of Children and the Law. The views and analysis expressed herein are entirely my own and do not reflect those of any other person or organization.

Introduction:

In recent years, scholars of Children and the Law have sought to redefine the field with a new eye towards the role of child development and developmental science. Developmental science is "the systematic scientific study of the conditions and processes producing continuity and change over time in the biopsychological characteristics of human beings."[1] Scholars in the field of Children and the Law have turned to this science to make the law more empirically sound and "in an effort to make law more responsive to children."[2] Research in this scientific discipline in recent decades has had a tremendous effect on the development and trajectory of law as it impacts children.[3] This turn to developmental science has influenced competing frameworks for understanding the field of Children and the Law.

In Part I, this Essay first describes and distinguishes between four prominent frameworks: the Authorities Framework, the New Law of the Child, the Child Wellbeing Framework, and Developmental Jurisprudence. In distinguishing among those frameworks, I pay particular attention to the use and definition of child development conveyed by each, as well as each framework's relationship to rights discourse. In Part II, I diagnose what is missing from the

[1] Urie Bronfenbrenner & Gary W. Evans, *Developmental Science in the 21st Century: Emerging Questions, Theoretical Models, Research Designs and Empirical Findings*, 9 SOC. DEV. 115, 117 (2000) (defining developmental science as "the systematic scientific study of the conditions and processes producing **continuity and change over time** in the biopsychological characteristics of human beings--be it over the life course, across successive generations, retrospectively through historical time, or prospectively in terms of implications for the course of human development in the future.").

[2] Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2369 n.28 (2022) ("A wave of legal scholarship has turned to the science of child development in an effort to make law more responsive to children's needs in areas including juvenile sentencing, special education, child welfare, and social welfare.").

[3] *See*, e.g., Miller v. Alabama, 567 U.S. 460 (2012) (turning to developmental science to hold that mandatory life without parole sentences for youth are unconstitutional); Graham v. Florida, 560 U.S. 48 (2010) (turning to developmental science to hold that life without parole sentences for youth charged with non-homicide offences are unconstitutional); Roper v. Simmons, 543 U.S. 551 (2005) (turning to developmental science to hold that the death penalty for crimes committed prior to age 18 is unconstitutional). For a perspective on developmental science and juvenile justice, see NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck, eds., 2013).

field of Children and the Law as represented by those frameworks. I first argue in Section II.A that the models struggle to use law to both define child development and limit the role of developmental science's influence on law. Addressing that deficit, I argue, is necessary in order to bring coherence and stability to the field. I call on scholars to reflect on and reconcile competing values in order to work towards a comprehensive framework that allows advocates working to promote the interests of children across substantive areas of law to work together and not against each other. In Section II.B., I speak to the developmental and jurisprudential importance of rights and recognizing children as rights holders. I argue that current scholarship fails to address not only the importance of access to process and justice for children but also the developmental significance of the conferral or denial of rights. In doing so, this Essay concludes by arguing that the field of Children and the Law must pay more attention to the nature, purpose, and developmental implications of rights. In this way, developmental science may be tailored towards informing and guiding discussion of processes, instead of shaping the law's normative values and directing the law on when to recognize rights for children or not.

II. What's Missing: A Critique of Current Approaches

In this Part, I identify several factors that are missing from the current state of Children and the Law scholarship, as represented by the four frameworks discussed in Part I. Each framework has something powerful to contribute and focuses on fundamental concerns with which any model framework in the field must wrestle. Nonetheless, I argue that no current framework adequately addresses two specific concerns. First, in Section II.A., I address the ways in which these frameworks fail to fully address the law's role in defining child development and limiting the role of developmental science in influencing jurisprudence. Second, in Section II.B., I discuss the ways in which these frameworks fail to address the role of rights and the ways in which legal rights and processes or the denial thereof interact with child development.

A. Centering Law in Engagement with Child Development

All four of the aforementioned frameworks—the Authorities Framework, the New Law of the Child, the Child Wellbeing Framework, and Developmental Jurisprudence—engage with developmental science and child development, though in different ways. First, the Authorities Framework focuses primarily on children's capacities to make decisions. It has specifically engaged scientific research in to support a view of children as less culpable in the criminal context and as capable of autonomous decision-making in the health context. Second, the New Law of the Child seeks to deprioritize the field's focus on child development and instead emphasizes children's interests. Third, the Child Wellbeing Framework is evidenced-based and uses science to support parental rights, which Scott and Huntington argue support children's well-being. Fourth, Developmental Jurisprudence relies on and applies developmental science research on childrearing to evaluate law's regulation of children.

Despite this increased attention to developmental science, critics point to several potential challenges with Children and the Law's increased reliance on developmental science. In order to bring stability and coherence to the transsubstantive field of Children and the Law, scholars must engage more deeply with the law's role in shaping and limiting jurisprudential engagement with developmental science.

It is undisputed that the field is plagued with unclear standards and competing understandings of the law's relationship to children across substantive areas of law. There is a "flimsiness of the Court's account of its special treatment of children's rights" and "[p]sychologists and lawyers alike have challenged the lack of consistency or coherence in the law's assignment of rights."[161] Scholars and advocates alike have thus increasingly turned to science to "offer[] a more subtle and empirically supported vision of children's development which they have applied to relevant legal contexts with increasing sophistication."[162] In many ways, this turn has led to more informed analysis and successful outcomes in certain contexts. The turn away from more common-sense analysis[163] and towards developmental science can be credited with monumental change in the law's approach to children, for instance in the juvenile justice context.[164] The law's turn to developmental science has also motivated legal actors who work with children to become more well-versed in child development, prompting

[161] Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 31 (2009-2010) [hereinafter Buss, *What the Law Should (and Should Not) Learn from Child Development Research*].
[162] *Id.*
[163] *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 ("[H]uman experience . . . teach[es] that parents generally do act in the child's best interests.").
[164] *See, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012) (turning to developmental science to hold that mandatory life without parole sentences for youth are unconstitutional); Graham v. Florida, 560 U.S. 48 (2010) (turning to developmental science to hold that life without parole sentences for youth charged with non-homicide offences are unconstitutional); Roper v. Simmons, 543 U.S. 551 (2005) (turning to developmental science to hold that the death penalty for crimes committed prior to age 18 is unconstitutional). For a perspective on developmental science and juvenile justice, see NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck, eds., 2013).

"judges and lawyers who deal with child-related cases . . . [t]o learn about research methodologies in the life and social sciences, so that they have the tools to evaluate the validity of the scientific evidence presented to them," as well as a deeper understanding of the children they work with and their behaviors.[165] One scholar observes, however, that "[m]ost research about the relationship between the law and child development science focuses on the question of how courts utilise the social and life sciences in children's cases."[166] This shift is undoubtedly reflected in scholarship as well, which—as demonstrated by the competing theories discussed in Part I—is faced with the challenge of trying to reconcile often competing uses of this research.[167]

The fundamental gap here is the role and power of law in guiding the use of developmental science. In many ways, law is responsive to the research and legal actors have powerfully taken advantage of the research to pursue reform. Nonetheless, the resulting jurisprudence lacks a coherent set of values and principles that would bring transsubstantive clarity and predictability to the field. There are several consequences of this. First, if law is responsive to and not engaged in setting terms under which developmental science is used, this makes the resulting jurisprudence unstable and dependent on scientific inquiry and results. For example, "[a]ny rights built on developmental research are vulnerable to attack if the match between research findings and legal age lines is not complete."[168] That vulnerability can be seen, for example, in the Supreme Court's categorical decision in *Roper v. Simmons*.[169]

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[165] NOAM PELEG, THE CHILD'S RIGHT TO DEVELOPMENT 200 (2019); *see, e.g.*, Gene Griffin, *Child Development and the Impact of Abuse and Neglect*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES (Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran, eds., 3d ed., 2016).
[166] PELEG, *supra* note 165, at 200.
[167] *See* GUGGENHEIM, *supra* note 7, at 250 (noting that "the different messages delivered by children's rights advocates and juvenile rights advocates have become difficult to reconcile").
[168] Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, *supra* note 161, at 36.
[169] 543 U.S. 551 (2005).

The Court's categorical ban on sentencing youth to death drew a line at age 18. "In insisting on applying a categorical age line in a context in which the law provides for highly individual assessments," Emily Buss argues, "the Court suggests that, in assigning blame to juvenile murders, the fit between age and relevant development was unusually close and consistent, and the conventional legal processes were especially ill-designed to identify the outliers."[170] Additionally, selective use of science has resulted in what appears to be inconsistent narratives of children and young people in different contexts. "[T]he treatment of capacities as fixed facts about the trajectory and pace of child development has created problems for those seeking to defend both adolescent autonomy rights (particularly abortion rights) and reduced penalties for juvenile offenders, because the capacity justifications point in opposite directions on these two issues."[171]

When it comes to developmental science's intervention in the field of Children and the Law, law has taken a back seat on its own turf. "[C]hanges in the meaning of 'child development' happen outside the legal arena, and legal actors not only are unaware of these changes, but they also, by and large, are not part of the discussion about them."[172] Currently, "[l]awyers and judges will probably have very little ability to contribute to conversations about the meaning of 'child development,' essentially because this term is not a part of their professional lexicon."[173] Lawyers are not trained "to engage at a high level with the details of scientific research."[174] Anne Alstott, Anne Dailey, and Douglas Nejaime point to two dangers.

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[170] *Id.* at 39.
[171] *Id.* at 42-43.
[172] PELEG, *supra* note 165, at 200.
[173] *Id.* at 199.
[174] Alstott, et al., *supra* note 2, at 2380. More training for lawyers in empirical methods might well be a worthy and meaningful goal. Nonetheless, the lack of empirical training for lawyers is not the fundamental problem I am concerned with here. The goal is not for lawyers and legal actors to become scientists. The point is that legal actors must not lose sight of the unique purpose, nature, and role of law, which is distinct from that of science.

First, "[o]pportunistic (or sincere but naïve) legal actors may invoke fringe science to justify legal rules."[175] Second, "opportunistic (or sincere but naïve) scientists may offer scientific findings as the basis for legal innovation without taking into account the legal and social values that should shape law."[176] These observations are significant.

To remedy these problems, law must engage with and define child development on its terms. Because "decisions of courts are made within legal frameworks," the legal profession must take account of "the constitutive role of law in this process," which requires that law "engage with [child development's] intrinsic meaning."[177] To center law, it is important to think about the difference between law and science. As Alstott, Dailey, and NeJaime eloquently remind us, "law is fundamentally normative," while "[s]cience is an empirical discipline."[178] They critically emphasize that "legal standards should articulate the values at stake and defend the relevance of science to the implementation of those values."[179]
To engage with child development and developmental science on law's terms requires clarifying those "values at stake."[180]

The challenge then for the field is to identify the core values at stake in order to conceptualize an overarching legal definition of child development and guidelines for the use of developmental science transsubstantively. Children and the Law scholars are well-positioned to do this—as it requires looking beyond short-term litigation strategy and reaching consensus on what these values are. The aforementioned scholars do not disagree that scientific inquiry and child development has and should influence the field and the

[175] *Id.*
[176] *Id.*
[177] PELEG, *supra* note 165, at 200.
[178] Alstott, et al., *supra* note 2, at 2370, 2382.
[179] *Id.* at 2382.
[180] *Id.*

development of law as it relates to children. The source of disagreement is rather how and, even more importantly, why it should. In the next Section, I address an additional factor that should inform this inquiry and help re-center the law: the importance of rights and process as key values that have important developmental implications.

B. The Relationship Between Rights, Process, and Child Development

In addition, what is lacking among these frameworks is an account of the developmental implications of rights for children, which includes engagement with access to justice[181] and legal process. Despite increased attention to barriers to justice in the international human rights context, "access to justice has neither been carefully conceptualized, nor contextualized, in relation to children."[182] This is even more pronounced in American scholarship, as demonstrated by the four theories discussed in Part I, that do not fully appreciate the importance and developmental implications of access to justice for children.

To center law in this discussion, I argue that the field of Children and the Law must engage more seriously with the notion of children as legal actors. That includes engaging with the values underlying the developmental implications of the denial or conferral of rights. Centering the law and identifying the values underlying the law's relationship to and regulation of children requires attention to the nature of law and rights.

[181] *See* Ton Liefaard, *Access to Justice for Children: Towards a Specific Research and Implementation Agenda*, 27 INT'L CHILD. RTS. J.195, 196-97 (2019) ("Access to justice is grounded in the fundamental right to an effective remedy and revolves around the right of children to seek remedies of (alleged) violations. And it concentrates on the legal empowerment of children thereto.").
[182] *Id.* at 197.

Recognizing individuals' legal rights is important in any legal system. At the heart of legal rights is a respect for the dignity and worth of an individual as a human being distinct from property and objects. As Lon Fuller articulated in *The Morality of Law*,

> To embark on the enterprise of subjecting human conduct to rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent.[183]

This sentiment, I argue, applies to children too. "Respecting human dignity," which includes children's dignity, "entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future."[184] When it comes to children, "[a] plausible theory of rights," Michael Freeman argues, "needs to take account not just of equality but also of the normative value of autonomy."[185] Respect for a child's autonomy means "treat[ing] that child as a person and as a rights-holder" and "it is clear that we can do so to a much greater extent than has been assumed hitherto."[186] It does not require engaging the false dichotomy Dailey and Rosenbury address in their Authorities Framework. Respecting the dignity of children is consistent with recognizing the extent of their autonomy, while still acknowledging that they are dependent on adults to fully meet their needs.[187]

Legal recognition requires access to process. The unique characteristics of court process "capture a deep and important sense associated foundationally with the idea of a legal system, that law is a mode of governing people that acknowledges that they have a view or

[183] LON FULLER, THE MORALITY OF LAW 162 (1964).
[184] Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 221 (Oxford 1979).
[185] MICHAEL FREEMAN, A MAGNA CARTA FOR CHILDREN: RETHINKING CHILDREN'S RIGHTS 365 (2020)
[186] *Id.* at 367.
[187] Dailey & Rosenbury, *supra* note 5, at 1480.

perspective of their own to present on the application of the norm to their conduct and situation."[188] This can—and should—be done, with regards to children, thereby respecting their dignity without needing to deny both their developmental status and developmental goals. Waldron powerfully articulates:

> [L]itigants get to tell their stories and argue their understanding of the law. A procedural system that simply gagged a litigant and refused even to consider her version of the case would be, in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt. Once we accept that human dignity requires litigants to be heard, justification of the advocate becomes clear . . . Human dignity does not depend on whether one is stupid or smooth.[189]

The above quote addresses the situation of many children involved in court proceedings. In fact, the law treats children even worse in many respects. For example, it denies children the status of litigant in many contexts, denying them not only legal process, but also legal standing.[190] The degree and nature of legal process provided an individual has dignitary implications. Historically, the degree of legal process afforded an individual reflected the value law and society placed on lives. "High-ranking persons would be regarded as capable of participating fully in something like a legal system: they would be trusted with the voluntary self-application of norms; their word and testimony would be taken seriously; they would be entitled to the benefit of elaborate processes etc."[191] In contrast, was "the class of persons, who were dealt with purely coercively by the authorities: there would be no question of trusting them or anything they said; . . . and they would not be entitled to make decisions or

[188] Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L. J. 200, 210 (2012).
[189] David Luban, *Lawyers as Upholders of Human Dignity*, 2005 U. ILL. L. REV. 815, 819 (citing Alan Donagan, Justifying Legal Practice in the Adversary System, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS ETHICS 130 (David Luban, ed. 1983)).
[190] *See, e.g.*, Stephen R. Arnott, *Autonomy, Standing, and Children's Rights*, 33 WM. MITCHELL L. Rev. 807 (2007) (addressing the denial of standing to children in most family law cases). While "[i]t is difficult to argue that children do not have sufficient stake in the outcome of a marriage dissolution case that may well determine where the child lives and with whom," Stephen Arnott points out, "children are generally not considered to be parties to marriage dissolution proceedings." *Id.* at 821.
[191] Waldron, *supra* note 188, at 213-14.

arguments relating to their own defense nor have their statements heard or taken seriously. They would not have the privilege of bringing suit in the courts, or if they were it would have to be under someone else's portion."[192] Waldron's observations mirror closely the legal situation of the child, who is merely an object of dispute in custody and visitation proceedings, for example, and who is unable in most cases to assert their rights and initiate court proceedings to make their views heard.[193]

Respecting children's rights also requires ensuring that any rights recognized by the court are in fact enforceable. Martin Guggenheim is not shy about his dislike for extending rights for children due not only to increased exposure to state intervention and but also the fact that "reliance on children's rights is no guarantee against the enactment of policies that serve children poorly."[194] It seems what Guggenheim is concerned about is that rights, when it comes to children, are often meaningless. And, in many cases, he is right. When it comes to children, courts' conferrals of rights are incomplete. As Freeman emphasizes, "[r]ights are valuable commodities but without remedies they have only expressive value."[195] What is important is not just that children are granted rights in certain contexts, but also that the right has the force of law in practice. This requires access not only to process but to tools and resources to enforce those rights.

Granting rights to children means doing more than granting them legal standing—as that alone would do little to allow most children to exercise those rights. Often times, their rights "cannot be met by recognizing that they have rights on par with adults. Vulnerability

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[192] *Id.*
[193] *See* Arnott, *supra* note 190.
[194] GUGGENHEIM, *supra* note 7, at 245-250, 247, 264 ("Clear rules, quickly enforced, would do far more to protect children's rights than protracted litigation ever could."). *See also id.* at 266 ("If children's rights advocates could recast claims on behalf of children from rights to what is fair and just for children, perhaps we could recapture a time when adults would better accept their responsibilities toward children.").
[195] FREEMAN, *supra* note 185, at 220; *see also id.* at 293 ("Where remedies are absent, rights are meaningless.").